80-1686

No. ———

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE MEAD CORPORATION,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, et al.,
(Adams Extract Co., et al. real parties in interest),
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. This court should grant the writ because the trial court has curtailed the right to trial by jury by ordering, after the jury's verdict and dismissal, supplemental evidentiary proceedings before a special master so that plaintiffs can attempt to prove the essential element of dollar damages which they failed to prove during the jury trial.

2. This Court should grant the writ to resolve an important and current issue of Seventh Amendment law on which the lower federal courts have exhibited considerable uncertainty: whether this Court's decision in *Gasoline Products Co.* v. *Champlin Refining Co.* authorizes federal trial courts to divide a single cause of action into two parts to be tried before two different fact finders.

3. This Court should grant the writ because the trial court, by reopening the record *after* the close of the trial and ordering a continuation of the trial on the issue of damages before a second fact finder, has so far departed from accepted judicial practice that intervention by this Court is warranted.

LIST OF PARTIES

The party appearing as the defendant-petitioner before the United States Court of Appeals for the Fifth Circuit and as the defendant before the district court was The Mead Corporation.*

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*Pursuant to Rule 28.1 of the Rules of the Supreme Court, as amended, the following entities are subsidiaries and affiliates of petitioner, The Mead Corporation: Altonaer-Wellpappenfabrik G.m.b.H.; British Columbia Forest Products Ltd.; Brunswick Pulp & Paper Co.; Europapel, S.A.; Graficarton, S.A.; Georgia Kraft Company; Gulf Supply Latina; Harima M.I.D.; Kraft Land Services, Inc.; Northwood Forest Industries Ltd.; Northwood Panel-

The parties appearing as plaintiffs-respondents before the United States Court of Appeals for the Fifth Circuit and as plaintiffs before the district court were

Accurate Metal Weatherstrip Company, Inc.
Adams Extract Company
After Six, Inc.
Al Barker Publishing Co.
The Amberley Greeting Card Co.
Andre-Boudin Bakeries, Inc.
Arcadia Furniture Corp.
Atlas Container Co., Inc.
Austin Products Co.
Bateman Canning Co.
The Beaumont Co.
Bert Paley Ltd.
Bodines, Inc.
Bookout & Mitchell Supply, Inc.
Bowman Dairy Company, Inc.
Burger King Corp.
Cantrell & Cochrane, Inc.
Carron Manufacturing Co., Inc.
Continental Nut Co.
Cook Distributing Co.
Cook Produce, Inc.
Co-Ordinated Industries, Inc.
Covington Fabrics Corp.
Dean Foods Co.
Dean Foods Products Company
Dean Milk Company, Inc.
Denver Meat Co.
District Hotel Supply, Inc.
Doranne of California d/b/a Embassy Giftwares

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board Company; Packagemaster Limited; Schoeller Photo Papers, Inc.; Schoeller Technical Papers, Inc.; Schoeller Technical Papers; Seaboard Paper Company; Mead Chemicals, Inc.; Mead-Emballage, S.A.; Mead Imballagi, S.p.A.; Mead-Toppan Company, Ltd.; Mead Verpackung G.m.b.H.; and Mead Verpakking B.V.

Douglas Furniture Corp.
Draper Canning Co., Inc.
Draper-King Cole, Inc.
Dulaney Foods, Inc.
Erie Seating Co.
Falstaff Brewing Company
Fox Deluxe Pizza Co.
Furniture Plastics, Inc.
Gandy's Dairies, Inc.
Gateway Farms, Inc.
General Brewing Co.
Golden Quality Ice Cream Co.
Grace Brewing Co.
Great Northern Packaging Corp.
Green Bay Foods
Griffin & Brand Sales Agency, Inc.
Grist Mill Co.
Haeger Potteries, Inc.
Huron Packaging Corp.
I. Kaplan, Inc.
Ilikon Corporation
International Frozen Foods, Inc.
Iowa Beef Processors, Inc.
ITT Continental Baking Co.
ITT Gwaltney, Inc.
Jefferson Orchards, Inc.
John Inglis Frozen Foods Co.
Keller Street Development Co.
Land O'Lakes, Inc.
Levee Furniture Co.
Liberty Dairy Company
Macomb Pottery Co., Inc.
Maier Brewing Co.
Marathon Enterprises, Inc.
Metro Molding Corporation
Mid-Valley Packing Co., Inc.
Mister B. Greeting Card Co., Inc.

Narragansett Brewing Company
Northland Aluminum Products, Inc.
Nutritional Food Products, Inc.
The Paniplus Co.
Pearl Brewing Company
Pearson Candy Co.
Penthouse Furniture Ltd.
Red Wing Industries, Inc.
Renown, Inc.
Rollins Container, Inc.
Rossville Packing Co., Inc.
S & P Company
Salsburg Meats, Inc.
Sambo's Restaurants, Inc.
Seneca Industries, Inc.
Shell-Tex Fisheries, Ltd.
Sky View Cooling Co.
Snyder-Craft Co., Inc.
Speas Co.
Steak and Ale Restaurants of America
Sunmark, Inc.
Tierra Royal Potteries, Inc.
Town House Furniture Ltd.
Trappe Frozen Foods Corp.
United Food Services, Inc.
United Foods, Inc.
Universal Cooperatives, Inc.
Valley Avocado Sales Inc.
Valley Farms, Inc.
Valley Plastics, Inc.
Walters Brewing Company
West Publishing Co.
Westside Paper Co.
Williams Manufacturing Co.
Winona Industries
Winter Garden, Inc.
Wittek Golf Supply Co., Inc.

Other defendants named in the original complaint in this litigation were

Alton Box Board Company
Boise Cascade Corporation
Champion International, Inc.
The Chesapeake Corporation of Virginia
Consolidated Packaging Corporation
Container Corporation of America
The Continental Group, Inc.
Corco, Inc.
Crown Zellerbach Corporation
Diamond International Corporation
Dura-Containers, Inc.
Fibre Box Association
Fibreboard Corporation
Georgia-Pacific Corporation
Green Bay Packaging, Inc.
Hoerner Waldorf Corporation
Inland Container Corporation
International Paper Company
Interstate Container Corporation
Longview Fibre Company
MacMillan Bloedel, Inc.
MacMillan Bloedel Containers, Inc.
Menasha Corporation
Olinkraft, Inc.
Owens-Illinois, Inc.
Packaging Corporation of America
Potlatch Corporation
St. Joe Paper Company
St. Regis Paper Company
Southwest Forest Industries, Inc.
Stone Container Corporation
Union Camp Corporation
U.S. Corrugated Fibre-Box Company
Western Kraft East, Inc.
Westvaco Corporation
Weyerhaeuser Company
Willamette Industries

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No.

IN RE CORRUGATED CONTAINER ANTITRUST LITIGATION

THE MEAD CORPORATION,
Petitioner,

v.

ADAMS EXTRACT COMPANY, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, The Mead Corporation ("Mead"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit denying Mead's Petition for Writ of Mandamus to vacate certain district court orders which deprive Mead of a jury trial in this class action litigation.

OPINIONS BELOW

The judgment sought to be reviewed by this petition for writ of certiorari was entered by the Court of Appeals for the Fifth Circuit without opinion. The Fifth Circuit's order and the unpublished district court orders which deprive Mead of its right to a jury trial are included in the Appendix at 1a-27a.

JURISDICTION

The Court of Appeals for the Fifth Circuit denied Mead's petition for a writ of mandamus on March 13, 1981, and Mead's petition for reconsideration on March 25, 1981. This petition for writ of certiorari was filed within 60 days thereafter. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

The Seventh Amendment of the United States Constitution provides in pertinent part:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .

STATEMENT OF THE CASE

I. Preliminary Statement

Mead is the only defendant which proceeded to trial through jury verdict in the *Corrugated Container Antitrust Litigation* class action.[1] The trial is over. The jury returned a special verdict and was dismissed on September 13, 1980. No judgment has been entered on the special verdict. Instead, on January 27, 1981, the district court, over Mead's objection, reopened the trial record and appointed a special master to conduct a protracted evidentiary proceeding to obtain evidence *outside* the trial record for the sole purpose of curing plaintiffs' failure of proof on the crucial jury issue of damages in order to support a judgment against Mead.

This petition for certiorari raises an important federal question because the district court's orders curtail

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[1] *In re Corrugated Container Antitrust Litigation*, MDL 310, (S.D. Tex.). Citations to the record are included in the accompanying Appendix and are cited hereafter as App. at ——.

the right to a jury trial in antitrust class actions contrary to the principles enunciated by this Court in scores of cases. The Seventh Amendment does not permit supplemental proceedings, after the jury's verdict and dismissal, which allow plaintiffs to attempt to prove dollar damages before a second fact finder which they failed to prove during the first jury trial. Mandamus is the appropriate remedy to stop the illegal proceeding, rather than wait for an appeal after the illegal proceeding takes place. *See, e.g., Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959); *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962); *La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957); *Dimick* v. *Schiedt*, 293 U.S. 474 (1935); *Ex parte Simons*, 247 U.S. 231, 239-40 (1918); *In re Winn*, 213 U.S. 458, 466-67 (1909).

By these post-verdict proceedings, Mead is being affirmatively subjected to continuing unconstitutional procedures. On February 13, 1981, Mead petitioned the United States Court of Appeals for the Fifth Circuit pursuant to the All Writs Act, 28 U.S.C. § 1651 (1976), and Rule 21, Fed. R. App. P., to direct the district court to

> (1) vacate its orders reopening the trial record and appointing a special master to obtain evidence *outside* the trial record, and
>
> (2) enter judgment based solely upon the trial record.

The Court of Appeals, without opinion, denied Mead's mandamus petition.

II. History of Proceeding

A. Background Information

1. *The Civil Complaints*

Plaintiffs alleged that, since at least January 1, 1960, 37 manufacturers of corrugated containers and sheets engaged in a single nationwide conspiracy to raise, fix, maintain and stabilize the prices of corrugated containers and sheets in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976).[2] The district court certified classes consisting of all persons in the United States who purchased corrugated containers or corrugated sheets from any defendant at any time during the period from January 1, 1960 to January 25, 1978, approximately 200,000 in number.[3]

2. *The Related Criminal Cases In Which Mead Was Acquitted*

The civil complaints were precipitated by a federal grand jury investigation which culminated in two indictments charging 14 corporations and 26 individuals with participating in an almost nationwide conspiracy to fix prices of corrugated containers and sheets.[4] Most of the defendants entered pleas of *nolo contendere* and received fines as their sentences. Mead, Continental Group and seven individual defendants entered pleas of not guilty and proceeded to trial on January 22, 1979. On April 27, 1979, Mead and the other defendants were *acquitted* by unanimous jury verdict.

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[2] *In re Corrugated Container Antitrust Litigation*, 441 F. Supp. 921 (J.P.M.L. 1977).

[3] *In re Corrugated Container Antitrust Litigation*, 80 F.R.D. 244 (S.D. Tex.), *mandamus denied*, No. 78-3684 (5th Cir. Dec. 29, 1978).

[4] *United States* v. *International Paper Co.*, Cr. No. H-78-11, and *United States* v. *Boise Cascade Corp.*, Cr. No. H-78-12 (S.D. Tex. filed Jan. 25, 1978).

3. *Settlements in the Civil Cases*

Prior to the civil class action trial, 34 of the 37 defendants settled for an aggregate amount in excess of $300 million, which now, with accumulated interest, approximates $400 million. Under those agreements, settling defendants did not remove their sales from the litigation. Thus, plaintiffs were able to extract substantial amounts from each succeeding defendant who settled because of the increased exposure to them created by prior settlements. Mead and two other defendants proceeded to trial, although the other two settled during the trial. Mead was the only defendant to proceed to verdict. While Mead's market share is only 2½ percent, plaintiffs seek treble damages against Mead based upon the total sales of 18 alleged "co-conspirators," even though such "co-conspirators" have settled. Plaintiffs claim that damages against Mead when ultimately determined in this illegal post-trial proceeding will be in the hundreds of millions of dollars, possibly as high as a billion dollars.

4. *The Civil Trial Proceedings*

The following facts are undisputed:

a. Prior to trial, at the May 16, 1980, pretrial hearing, the district court ordered that the trial would *not* be bifurcated, and that the issues of liability and damages would be tried before a single jury, stating:

> THE COURT: Bifurcation of liability and damages, no.
>
> MR. BAKER: What did you say on that, Judge?
>
> THE COURT: No. I am not going to bifurcate.[5]

b. On June 9, 1980, the trial commenced as a single, unified non-bifurcated jury trial. The district court instructed the jury at the outset that "the plaintiffs have

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[5] May 16, 1980, Pretrial Hearing at 60, App. at 28a; Pretrial Order No. 51, dated May 23, 1980, App. at 30a.

the burden of proving each essential element of their case," *i.e.*, conspiracy, impact and damages.[6]

c. Plaintiffs' liability evidence at trial consisted of six live industry witnesses and the reading of the transcripts of some grand jury and criminal trial witnesses who testified to instances of price exchanges in a few local markets. In addition, plaintiffs introduced proof that 176 witnesses, all of whom had been represented by attorneys, had earlier asserted their Fifth Amendment privileges, and a map showing these witnesses' alleged employment locations throughout the United States. One hundred sixty-eight of these employees had not worked for Mead, most having worked for Mead's settling co-defendants. None of the Fifth Amendment assertions had been introduced at the earlier criminal trial.

d. Plaintiffs' theory of damages was based upon an expert witness' econometric model which relied on nationwide average industry data, unrelated to Mead data or plaintiffs' purchases. Plaintiffs' expert testified that class members were damaged between 7.7 to 19.3 percent, but did not testify as to the amount of dollar damages sustained by class members.[7]

e. Plaintiffs attempted to prove purchases of class members as a predicate for dollar damages by offering evidence of gross sales of manufacturers of corrugated containers and sheets, irrespective of whether the sales were to class members. The district court, however, did not admit this evidence.[8]

f. At the close of plaintiffs' case-in-chief on July 28, 1980, the district court denied Mead's motion for a

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[6] Tr. Vol. 1 at 37, 39-40, 45, 58-59; App. at 32a-35a.

[7] Tr. Vol. 49 at 105-06, App. at 36a; Tr. Vol. 50 at 222-23, App. at 37a-38a.

[8] Tr. Vol. 55 at 188-89, App. at 39a-40a; Tr. Vol. 95 at 63-64, App. at 46a.

directed verdict. However, the district court stated that such proof of dollar damages was an indispensable element of plaintiffs' case. Accordingly, the district court took the extraordinary step of permitting plaintiffs to rest, subject to reopening the record, prior to submission to the jury, to cure their failure of proof of dollar damages.[9]

g. Subsequently, however, plaintiffs made no attempt to offer in evidence by stipulation or otherwise, class members' purchases or the dollar damages purportedly sustained by class members. The reason for their failure (whether tactical or otherwise) is immaterial.[10] The fact is they knowingly offered nothing and went to the jury without damage proof.

h. The district court specifically laid the blame on plaintiffs, stating:

> Plaintiffs apparently never made any effort to reach a stipulation. Of course, it was not the responsibility of defendants to do so. *If there is any blame to be assigned in this regard, it lies at the plaintiffs' door.*[11]

i. Plaintiffs now propose to make the damage proof before the special master which they unsuccessfully attempted before the jury.

j. After Mead rested its defense, plaintiffs, on September 5, 1980, stated for the first time that they would forego proving at trial the alleged dollar damages sustained by class members. On that date, plaintiffs filed

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[9] Tr. Vol. 55 at 212, App. at 40a.

[10] Mead believes that plaintiffs knew that the jury, which had heard the limited evidence of liability, would never return a verdict against sole defendant Mead in the hundreds of millions of dollars. Thus, plaintiffs deliberately attempted to dissect the case, keeping from the liability jury the amount of dollar damages and keeping from the damage fact finder the limited evidence of liability.

[11] Pretrial Order No. 61 at 3, Ap. at 12a.

their Memorandum in Support of Their Proposed Special Verdict Form wherein they suggested submitting to the jury the damage issue in terms of a percentage overcharge as a "measure of damages," with possible post-verdict proceedings before a special master or a new jury to determine the amount of damages allegedly sustained by class members.

k. The next day, September 6, 1980, Mead vigorously objected, stating:

> The Court in this case specifically declined to grant a bifurcated trial and ordered that the issues of liability and damages would be tried together. To now change that ruling, as plaintiffs suggest, and have the Court determine disputed issues of fact as to impact and damages in the event liability is found would be unfair, constitute a denial of due process and a denial of trial by jury.[12]

l. Two days later, on September 8, 1980, after the close of all evidence, the district court, during arguments on jury instructions, recognized plaintiffs' failure of proof of amount of damages and Mead's position relating thereto:

> MR. BAKER: (Quoting from the district court's Charge to the Jury.) "You are asked to find the amount of the overcharge, if any, in terms of percentage." I want [that] in terms of a *dollar overcharge.*
>
> THE COURT: Oh, I know that. I know that you object to that. No sense in us arguing. I'm going to submit it this percentage way.
>
> MR. BAKER: Well, how are you ever going to come up with damages?
>
> . . . .
>
> THE COURT: I don't see how I can submit it any other way.

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[12] Letter of September 6, 1980, Harold F. Baker to Honorable John V. Singleton, Jr., at 3, App. at 43a.

MR. BAKER: Well, I can suggest how you can submit it.

THE COURT: How? *There is no dollar figure here for them to find.*

MR. BAKER: They have claims that were made here by the class members against the settlement funds and they know exactly what those claims are.

. . . .

THE COURT: That is not in evidence here.

MR. BAKER: It is their burden of proof.

THE COURT: *I understand your point is that if they have failed to prove damages, that's just too bad, they failed.*

MR. BAKER: You bet your life.

THE COURT: But I'm stuck with a charge on what has been put into evidence in this case, and if the plaintiffs—

MR. BAKER: *Well, then, I'm entitled to a directed verdict right now.*

THE COURT: *I understand your point.*[13]

m. It was not until September 8, 1980, after the trial record was closed and the jury instructions were resolved, that the district court decided to submit to the jury only the issue of "measure of damages" and *not* the crucial fact issue of amount of damages purportedly sustained by class members.[14] Now the district court proposes to

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[13] Tr. Vol. 94 at 145-47, App. at 44a-45a; Tr. Vol. 96 at 292, App. at 47a; Tr. Vol. 100 at 14-15, App. at 48a.

[14] Tr. Vol. 94 at 145-47, App. at 44a-45a. Plaintiffs' contention that during the trial the district court indicated the "possibility" that the jury would not determine dollar damages does not cure the denial of Mead's right to jury trial. Prior to trial, the district court ordered a non-bifurcated trial on all issues. Even the district court admits that it did not reverse its no-bifurcation decision before September 8, 1980, after the close of all the evidence, when, according to the district court, it did so implicitly by ruling on the jury instructions. Pretrial Order No. 61 at 6, App. at 16a.

allow plaintiffs to prove before the Special Master exactly what they tried and failed to prove before the jury even though the court gave them a second chance to prove dollar damages by holding open the trial record for that specific purpose prior to submission of the case to the jury.

5. *The Jury Verdict*

The case was submitted to the jury on September 11, 1980. On September 13, 1980, the jury returned the special verdict against Mead and was dismissed.[15]

> The jury found Mead to be a member of a conspiracy to fix, raise, maintain or stabilize or to otherwise affect prices of corrugated materials by agreeing not to compete on the basis of price or agreeing to exchange price information, which agreement had the purpose of affecting, or did in fact affect, prices paid for containers and sheets sold throughout the United States.[16]

With respect to the damages question, the jury found that purchasers were damaged "5 percent." Although the law is established that a special verdict must find all the essential facts to support a judgment,[17] and although Mead requested that the jury be required to find the dollar amount of damages, if any, purportedly sustained by class members, the jury was not asked to find and did not make any such finding.

B. The District Court's Post-Verdict Orders

A month after the jury's dismissal, plaintiffs, on October 10, 1980, moved for the appointment of a special master to conduct additional discovery and obtain evi-

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[15] Tr. Vol. 102 at 49, App. at 56a.

[16] Special Vedict at 1, App. at 49a.

[17] *E.g.*, *Ward* v. *Cochran*, 150 U.S. 597, 608 (1893); *Hodges* v. *Easton*, 106 U.S. 408, 412 (1882).

dence by compulsory process outside the trial record, to support a dollar judgment against Mead.[18]

On January 27, 1981, the district court appointed a special master to supervise the post-verdict proceedings to supplement the trial record to support the entry of a damage judgment against Mead. The district court ordered "that a fund be created in the amount of $250,000" to compensate the master and pay other expenses, which fund "shall be replenished as the court may direct." [19] Pursuant to the district court's order, the special master is to prepare a report on damages based upon evidence *outside* the trial record.[20] The district court further ordered that:

> After the master has filed his final report, the court may hold hearings as it deems appropriate to resolve all matters not previously resolved by summary judgment. At any such hearing, the master's final report shall constitute *prima facie* evidence on all issues addressed by the court.

The parties at such hearings, moreover, "shall be limited to the arguments and evidence presented to the master prior to the formulation of the master's final report."

Through these post-verdict proceedings, plaintiffs seek to prove before the special master the dollar damages they tried and failed to prove before the jury.

The post-verdict evidentiary proceedings have not yet begun. On April 8, 1981 the Special Master will hold hearings on objections to interrogatories served by plain-

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[18] Plaintiffs' Motion for Proceedings Preparatory to Entry of Judgment, filed Oct. 10, 1980. Plaintiffs did not move for a new trial on the issue of damages.

[19] The initial fund was subsequently reduced to $50,000 by the district court, apparently after Mead's mandamus petition was filed, although it is still subject to supplementation.

[20] Pretrial Order No. 62, App. at 22a.

tiffs upon Mead and 18 companies which previously settled.[21]

REASONS FOR GRANTING THE WRIT

I. By Permitting Plaintiffs to Attempt to Prove an Essential Fact Before a Second Fact Finder in a Subsequent Proceeding, After Dismissal of the Jury, the District Court Has Decided an Important Question of Federal Law Which Conflicts with Principles Established in Numerous Seventh Amendment Decisions of this Court.

The question presented by this petition is whether, consistent with the Seventh Amendment, a district court can decide after the close of the evidence not to submit to the jury the crucial issue of dollar damages; and, after the jury's verdict and dismissal, reopen the trial record before a second fact finder for proof of damages which plaintiffs tried and failed to establish before the jury. The decisions of the Court construing the Seventh Amendment prohibit such a practice.

Nonetheless, in recent years, lower courts, misconstruing this Court's decision in *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931), have approved the practice of dividing a single cause of action for trial before two different fact finders. This court should grant the writ and state the appropriate rule.

A. This Court Must Scrutinize an Infringement of the Right to Jury Trial.

For over a century, the Court has repeatedly granted certiorari to review district court orders which infringe upon a party's Seventh Amendment right to a jury trial. *E.g.*, *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959); *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962); *Rogers* v. *Missouri Pacific Railroad*, 352 U.S. 500 (1957); *Jacob* v. *New York City*, 315 U.S. 752 (1942); *Dimick* v. *Schiedt*, 293 U.S. 474 (1935); *Ward* v.

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[21] Notice of Master's Hearing, App. at 57a-58a.

Cochran, 150 U.S. 597 (1893); *Hodges* v. *Easton*, 106 U.S. 408 (1882); *Collins* v. *Riley*, 104 U.S. 322 (1881).

In *Beacon Theatres*, the Court repeated its statement of fifty years earlier as to the reason for granting certiorari in such cases:

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. *Dimick* v. *Schiedt*, 293 U.S. 474, 486 (1935).

359 U.S. at 501. The Court further stated that "the right to trial by jury applies to treble damage suits under the antitrust laws, and is, in fact, an essential part of the congressional plan for making competition rather than monopoly the rule of trade." *Id.* at 504. The Court noted that "*it is particularly undesirable to have some of the relevant considerations* [in determining a violation of the antitrust laws] *tried by one fact finder and some by another.*" *Id.* at 508 n.10.

Similarly, in *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469, 470 (1962), the Court granted certiorari and reversed the court of appeals' denial of a mandamus petition to reinstate a jury demand stricken by the district court, stating that certiorari was granted

> because the action of the Court of Appeals seemed inconsistent with protections already clearly recognized for the important constitutional right to trial by jury in our previous decisions.

The district court's post-verdict orders reopening the trial record, after the jury's verdict and dismissal, for a supplemental proceeding before a second finder of fact is another attempt to curtail the right to trial by jury which this Court should scrutinize. Here, plaintiffs attempted to prove the amount of damages before the jury and failed. They now seek to prove those damages

befor a second fact finder in these post-verdict proceedings, although that fact finder will never hear the evidence presented to the jury.

B. Reopening the Record, After the Jury's Verdict and Dismissal, for the Admission of Additional Evidence Before a Second Fact Finder Violates Mead's Right to a Jury Trial.

The Seventh Amendment to the United States Constitution "preserves" the right to trial by jury in the federal courts in the manner in which trial by jury was historically conducted. *E.g.*, *Colgrove* v. *Battin*, 413 U.S. 149, 152 (1973); *Curtis* v. *Loether*, 415 U.S. 189, 192-94 (1974); *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 8-9 (1899).

It is axiomatic that a plaintiff is required to present all of its proof in support of its cause of action before the jury. After the record has been closed and the jury dismissed, the trial court has no discretion to *reopen* the record in order to admit additional evidence before a second fact finder. The district court orders violate the established rule that where plaintiffs' evidence is insufficient to support a verdict, judgment must be entered for the defendant. *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U.S. 654 (1935). 6A Moore's *Federal Practice* ¶ 59.04[13], at 59-31 (2d ed. 1979).

An integral and fundamental part of trial by jury has always been that *the* jury, a single jury, would decide the entire case, or at least all factual issues presented. This principle was expressed firmly and clearly in *Hodges* v. *Easton*, 106 U.S. 408 (1882). There the Court disapproved the withdrawal from the jury, for resolution at a separate proceeding, of certain "undisputed" fact issues relating to damages. Justice Harlan stated for the Court:

> The record discloses that the jury determined a part of the facts, while other facts, upon which the final

> judgment was rested, were found by the court to have been conceded or not disputed. . . . [W]e then have a case at law, which the jury were sworn to try, determined, as to certain material facts, by the court alone, without a waiver of jury trial as to such facts. It was the province of the jury to pass upon the issues of fact, and the right of the defendants to have this done was secured by the Constitution of the United States. They might have waived that right, but it could not be taken away by the court. Upon the trial, if all the facts essential to a recovery were undisputed, [it would] have authorized the withdrawal of the case altogether from the jury. . . . The court could not, consistently with the constitutional right of trial by jury, submit a part of the facts to the jury, and, itself, determine the remainder without a waiver by the defendants of a verdict by the jury. . . .

Id. at 411-12. The same principle has been applied to other cases where special verdicts were employed. The jury, in a special verdict, as here, must find on *every essential fact* on which the Court's judgment is based. *Slocum* v. *New York Life Insurance Co.*, 228 U.S. 364, 388 (1913); *Ward* v. *Cochran*, 150 U.S. 597, 608 (1893); *Suydam* v. *Williamson*, 61 U.S. 427 (1858); *Collins* v. *Riley*, 104 U.S. 322, 327 (1881). These cases have never been overruled or even questioned by any subsequent decision of this Court.

C. *Gasoline Products Co.* v. *Champlin Refining Co.* Does Not Sanction Withdrawing an Essential Issue of Fact From the Jury.

Relying on *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931), several lower federal courts faced with the pressures of managing class actions in antitrust cases have sanctioned the practice of dividing a single cause of action for trial before two separate fact finders. Others have expressed confusion or uncertainty concerning the propriety of this practice.

Gasoline Products does not support such a practice and this Court should grant the writ and resolve the confusion which that case has generated.

In *Gasoline Products*, a trial was had on liability and damages to a single jury. The court of appeals had affirmed the jury's verdict on liability, but reversed the district court "with respect to the measure of damages" and ordered a new trial limited to the damage issue only, rather than ordering a retrial on the jury's unimpeached verdict on liability. The question presented to the Court on certiorari was whether the new trial could be so limited. The Court stated that the Seventh Amendment did not require that an issue

> once correctly determined, in accordance with the constitutional command, be tried a second time, even though justice demands that another distinct issue, because erroneously determined, must again be passed on by a jury. *Id.* at 498.

Nevertheless, the Court reversed the decision of the court of appeals and ordered a new trial on all issues, finding that they were inextricably interwoven.

There is nothing, not a hint, that the Court in *Gasoline Products* had any notion that it was overruling *Hodges* or was generally authorizing district courts to divide the trial of a single case between two juries—one to find on liability and the other to find on damages—or to divide the damage issue between "measure of damages" and "amount of damages." Indeed, for some 45 years following the *Gasoline Products* decision, no lower court interpreted that case as authorizing the division of the trial of a single cause of action between two juries.[22]

In the last five years, however, a few courts have misapplied *Gasoline Products*, reformulating its holding as a possible basis for bifurcating *pretrial* the liability issue

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[22] Bifurcation in the same of separating issues before the *same* jury, which Mead requested before trial, is not here in issue.

from the damage issue to be tried before two different fact finders.

The Court of Appeals for the Ninth Circuit in *United Air Lines, Inc.* v. *Wiener*, 286 F.2d 302 (9th Cir.), *cert. denied*, 366 U.S. 924 (1961), originally found that a submission of liability and damages to two different juries was improper, but in *Arthur Young & Co.* v. *United States District Court*, 549 F.2d 686, 693 (9th Cir.), *cert. denied*, 434 U.S. 829 (1977), the court of appeals approved such a division where the issues were not interwoven, relying on *Gasoline Products*, asserting that the rules for "contemporary courts faced with modern litigation of substantial complexity" had changed. *See also In re Gap Stores Securities Litigation*, 79 F.R.D. 283, 305 n.22 (N.D. Cal. 1978).

The Court of Appeals for the First Circuit reversed a separation of issues on liability and damages before two different juries in *Franchi Construction Co.* v. *Combined Insurance Co. of America*, 580 F.2d 1, 7 (1st Cir. 1978), but it asserted that the practice of dividing single cases for trial before different juries could be proper in certain situations under *Gasoline Products*. Following the dicta in *Franchi Construction Co., supra*, the district court in *Payton* v. *Abbott Labs*, 83 F.R.D. 382, 394 (D. Mass. 1979), held that issues in a single class action may be divided up and tried before different juries where the issues are distinct.

A district court in the Tenth Circuit in *Martin* v. *Bell Helicopter Co.*, 85 F.R.D. 654, 659-60 (D.Colo. 1980), has also approved the use of two juries where the issues were distinct and separable, citing *Gasoline Products*.

Other courts have expressed uncertainty as to whether or not *Gasoline Products* authorizes the use of two different juries to try two parts of the same cause of action. The Seventh Circuit Court of Appeals expressly reserved ruling on the issue of submitting part of a case to a second jury, stating:

> [W]e do not face that question on this appeal. Whether a party is deprived of a jury trial as contemplated by the Seventh Amendment when some of the issues are submitted to one jury and other issues to a second jury is a more difficult question to resolve.

Hosie v. *Chicago & North Western Railway*, 282 F.2d 639, 642 (7th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961). The district court, in the *In re Folding Carton Antitrust Litigation*, 75 F.R.D. 727, 735 (N.D. Ill. 1977), stated that bifurcated trials were constitutional, "especially where the same jury tries both the issues of liability and damages unless the parties agree otherwise."

The Second and Third Circuits have expressed uncertainty on this issue. *In re Master Key Antitrust Litigation*, 528 F.2d 5, 15 (2d Cir. 1975); *Link* v. *Mercedes-Benz of North America, Inc.*, 550 F.2d 860, 862 (3d Cir.), *cert. denied*, 431 U.S. 933 (1977).

Although the Fourth Circuit has never addressed the issue of bifurcating issues before *different* juries, the district court in *Pruitt* v. *Allied Chemical Corp.*, 85 F.R.D. 100, 117 n.8 (E.D. Va. 1980), a class action, stated that "[i]t is unclear whether, under *Gasoline Products Co.* v. *Champlin Refining Co.*, . . . the same jury that tries the issue of liability must try individual damages as well." Nevertheless, the district court contemplated using a single jury.

Finally, Fifth Circuit decisions suggest that separation of issues even before the *same* jury should be approached with "trepidation" and "is not the usual course that should be followed." *Alabama* v. *Blue Bird Body Co.*, 573 F.2d 309, 318 (5th Cir. 1978); *Response of Carolina, Inc.* v. *Leasco Response, Inc.*, 537 F.2d 1307, 1323-24 (5th Cir. 1976); *Terrell* v. *Household Goods Carriers' Bureau*, 494 F.2d 16, 24 (5th Cir.), *cert. dismissed*, 419 U.S. 987 (1974).

By these post-verdict proceedings, plaintiffs are seeking to convert the jury's "5% verdict" into a $1 billion judgment through the use of a second fact finder which did not hear the evidence presented to the jury. *Gasoline Products* could not have sanctioned this procedure, and the facts of this case underscore the wisdom of *Hodges*. The ultimate issue in any civil case is the dollars the defendant may have to pay to the plaintiff. The idea of trying liability and measure of damages to one jury and amount of damages to another, separates two inseparable parts of a single case. Obviously, evidence pertaining to "amount of damages" is relevant to a determination of "measure of damages" and vice versa. The credibility, substantiality, and validity of the theory of "measure of damages" is directly affected by the "amount of damages" resulting from its application. The jury must consider all the evidence together. In this case, however, the jury was told that the dollar damages resulting from the percentage overcharge measure of damages was *immaterial*. Mead, therefore, was deprived of having the jury determine the dollar consequences of the verdict.

While tactical incentives to divide inseparable issues in class actions are apparent, Rule 23 did not and could not authorize this result. This practice, by leaving no jury responsible for the whole *case*, has the effect of depriving a defendant of the standards of fairness and equity which a jury brings even to a complex case and which is the defendant's right under the Seventh Amendment. By separating part of the case away from the jury, Mead—with a 2½ percent market share—may suffer a judgment grotesque in comparison to any injury the jury could possibly believe that it caused.

Trial by a jury of laymen was important to the founders because juries represent the layman's common sense, the "passional elements in our nature" and, thus, keep the administration of law in accord with the wishes and feelings of the community. O. Holmes, *Collected Legal Papers* 237 (1920). The purpose of a jury trial

in civil cases is "to assure a fair and equitable resolution of factual issues." *Colgrove* v. *Battin*, 413 U.S. 149, 157 (1973).

The Court has been particularly sensitive to the jury's role as assessor of damages in a civil case. In *Dimick* v. *Schiedt*, 293 U.S. 474, 478, 480 (1935), the Court stated:

> After pointing out the jealous regard of the American people, as evidenced by constitutions and legislation, for the right of jury trial, the court said that the judgment of the jury had been incorporated as an indispensable element in the judicial administration of the country; that in all cases sounding in damages, these damages must be assessed by the jury and not by the court independently thereof; . . .
>
> * * *
>
> [i]t was always admitted "that in cases where the amount of damages was uncertain their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it."

Having tried the case as a single jury trial on all issues and the jury having returned its special verdict, Mead is being deprived of that jury trial by the district court's post-jury verdict orders submitting the dollar damage issue to a second fact finder. There is no legal support for the district court's post-verdict orders.[23]

II. This Court Should Grant the Writ Because the Trial Court, by Reopening the Record After the Close of the Trial and Ordering a Continuation of the Trial on the Issue of Damages Before a Second Fact Finder, Has so far Departed from Accepted Judicial Practice that Intervention by this Court Is Warranted.

The trial judge below did not decide to try the issue of damages to a second fact finder until *after* the end of the jury trial. Such a practice has never been sanc-

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[23] Nor is discretion involved. Plaintiffs did not seek a new trial.

tioned by any court in the land. In every case which has permitted any kind of bifurcation of issues, the trial court has always entered a *pretrial* bifurcation order so that the parties and the court clearly understood prior to trial what issues would be tried in each phase of the proceedings. At least in the absence of a pretrial order that a trial will be divided, centuries of jurisprudence have established the proposition that when a jury has been dismissed, the trial is over. Any mistakes or omissions made by a litigant cannot then be made up by impaneling a new jury to hear more evidence. Finality of litigation requires this result. Otherwise, every verdict would be subject to a post-trial "bifurcation" order. By ordering a second proceeding on damages and by issuing the order for the first time *after* the conclusion of the trial, the trial court has so departed from accepted judicial procedure as to warrant intervention by this Court.

III. Mandamus Prior to the Second Proceeding Is the Appropriate Remedy to Prevent the Denial of a Party's Right to a Jury Trial.

Certiorari to review the Court of Appeals' refusal to issue a writ of mandamus to vacate the district court's orders is the appropriate method of reviewing the issue presented here. Under numerous cases decided by the Court, it is established that Mead is entitled to have the illegal proceeding stopped *now*, before it begins, rather than wait for an appeal. In *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, 511 (1959), the Court held: "We think the right to grant mandamus to require jury trial where it has been improperly denied is settled." *Accord, Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962).

Ex parte Simons, 247 U.S. 231 (1918), established that mandamus should issue before the second proceeding commences rather than review its legality on appeal. The Court said:

> If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt with *now*, before the plain-

> tiff is put to the difficulties and the Courts to the inconvenience that would be raised by [the illegal proceeding]. (emphasis added).

Id. at 239-40. *See also In re Winn*, 213 U.S. 458, 466-67 (1909). *Accord, La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957); *United States Alkali Export Association* v. *United States*, 325 U.S. 196 (1945).

The district court has no discretion to reopen proceedings after the jury verdict and the jury's dismissal and to order protracted non-jury proceedings before a special master to obtain evidence outside the trial record. The district court has no discretion to infringe on Mead's right to have the claims against it determined by a jury trial either by denying a jury trial *ab initio* or by taking a jury trial away, once had. Rather than waiting to erase the separate damages proceeding, the Court should decide now that the Seventh Amendment requires a trial of the case before a single jury. The failure of the Court of Appeals to exercise mandamus jurisdiction under these circumstances justifies allowance of a writ of certiorari by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: April 7, 1981

80-1686

No. ——

Office-Supreme Court, U.S.
FILED
APR 7 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE MEAD CORPORATION,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, et al.,
(Adams Extract Co., et al.
real parties in interest),
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ORDER—Filed February 18, 1981

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 81-2050

IN RE: THE MEAD CORPORATION,
Petitioner.

On Petition for Writ of Mandamus

Before GEE and RUBIN, Circuit Judges.

BY THE COURT:

IT IS ORDERED that a response be filed to the Petition for Writ of Mandamus not later than March 9, 1981.

IT IS FURTHER ORDERED that further proceedings in the District Court are stayed pending further order of this Court.

ORDER—Filed March 13, 1981

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-2050

IN RE: THE MEAD CORPORATION,
Petitioner.

On Petition for Writ of Mandamus

Before GEE, RUBIN and TATE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus is DENIED.

ORDER—Filed March 25, 1981

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 81-2050

IN RE: THE MEAD CORPORATION,
Petitioner.

On Petition for Writ of Mandamus to the
United States District Court
for the Southern District of Texas

Before GEE, RUBIN and TATE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that petitioner's motion for reconsideration of the Court's order of 3-13-81 denying its petition for writ of mandamus is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. 310
(All Cases)

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

PRETRIAL ORDER NO. 60

1. A hearing was held on December 1, 1980, to discuss methods of reducing the jury verdict in the class case to judgment. The court has studied the briefs and heard the arguments of the parties, and has reviewed the motions and rulings already made which have a bearing on this issue.

Initially, the court overrules Mead's objections to any proceedings other than judgment for it which are based on the reservation by the court of the final calculation of a dollar amonut of damages and the [corollary] absence of jury findings as to a dollar amount. It is true that before trial the three defendants then remaining in the case announced that they were considering filing a motion for separate trials of the liability and damages aspect of this case. Defendants' Proposed Final Pretrial Order of May 14, 1980, p. 5. At a conference on May 16, 1980, the court announced that it would not bifurcate damages from liability and in Pretrial Order No. 51 entered May 23, 1980, stated that defendants were deemed to have made a "motion to bifurcate the trial of liability and damages issues" and that the motion was overruled. This ruling was based on the substantial case law in this circuit which requires that impact or fact of injury be proven as part of liability, and the fact that the additional proof necessary to allow a jury to de-

termine a measure of damages, if any, would be more efficiently presented to the same jury than to a new one. It was, however, clear to the parties and to the court that plaintiffs' damages testimony would be framed in percentage figures. Their economic expert's report was filed April 1; his deposition was taken in mid-April. Plaintiffs attempted through April to get interrogatory answers from settling defendants as to their dollar volume of sales to class members. Settling defendants objected strenuously on the grounds that such requests were premature and burdensome and in Pretrial Order No. 48, entered April 23, the court sustained their objections except as to net sales by year. Until a conspiracy, the relevant time period and the relevant coconspirators were determined by the jury it seemed unnecessarily burdensome to require settling defendants to respond with such detailed information.

As the trial progressed, plaintiffs, at the court's urging, attempted to arrive at stipulations with the dwindling number of defendants as to the dollar sales of corrugated to class members. No stipulations were achieved.

As matters stood when the plaintiffs' case neared its close, the court could allow plaintiffs to submit only a percentage overcharge issue to the jury and separate out for later determination what dollar volume of sales would be multiplied by the percentage, if any, found by the jury—a task unlikely to present any contested issues of material fact; or it could require all defendants to pursue the expensive and burdensome task of unearthing the relevant data for the entire alleged conspiracy period, require plaintiffs to present that data as evidence, and require the jury to make the complicated arithmetical calculations necessary to reach a dollar figure. It should be stressed that the court considered it unlikely that plaintiffs would prevail on their allegations of fraudulent concealment to toll the statute of limitations: the court

had repeatedly stated that it was seriously considering granting summary judgment or directing a verdict on this issue, and the court's doubts as to plaintiffs' proof thereon were confirmed by the jury's verdict that fraudulent concealment was not shown by a preponderance of the evidence. Further, the plaintiffs' case was relatively weak against certain alleged coconspirators, and the legal question of whether a company found to be a member of the alleged conspiracy would be responsible for overcharges by non-conspirators had not been briefed or decided, the case law on this point being extremely unsettled. Additionally, the question of whether a conspirator had withdrawn was an open one for the jury's consideration. All these issues made the submission of dollar sales evidence and the calculation of a dollar damages amount so complicated and unwieldy as to overburden severely the jury's ability to arrive at an accurate dollar figure. The court therefore decided to separate out the calculations of a dollar figure for such proceedings as might most efficiently dispose of it, should the jury find the essential elements: fact of conspiracy, membership of remaining defendant Mead, fact of injury, and some percentage of overcharge resulting from the conspiracy. In fact, the court's concerns were fully justified. The jury found some of the alleged conspirators to be innocent, found one to have withdrawn, and found no fraudulent concealment to toll the statute of limitations.

The decision to separate this issue for later proceedings, should they become necessary, was known to the parties. The issue does not overlap those submitted to the jury and is not so intertwined with them as to render this decision unjust. It is an arithmetical calculation of a jury-determined percentage of overcharge multiplied by the relevant sales by corrugated manufacturers to class members. In the unlikely event that a contested fact issue is raised by the sales figures, which settling

defendants have not yet begun to produce, it can be dealt with by impaneling another jury.

Mead's argument that the trial was not bifurcated and therefore plaintiffs have failed to prove their case is simply groundless. Mead knew all along that the court was considering using only a percentage figure, as plaintiffs urged, if stipulations could not be achieved. Mead knew, at the close of the evidence, that no stipulations would be reached and that the court therefore was allowing submission of damages on a percentage basis. Mead's objection to this part of the jury instructions was made and overruled.

In sum, the court made, and the parties were well aware of, the decision to proceed on a percentage basis and reserve for later proceedings the questions of a final dollar amount.

It now becomes necessary to gather the data from which the necessary computations can be made. To guide the plaintiffs, Mead, and the settling defendants in accumulating their sales information, the court lays down the following basic rules:

(a) only the sales for the period March 7, 1973 through December 31, 1975 are in question;

(b) only sales to class members are relevant. That is intracorporate sales or sales to other defendants (settling or non-settling), to independent corrugated manufacturers, or to opt-out plaintiffs are not involved;

(c) international sales are not relevant;

(d) only the prices actually paid are relevant. If there were discounts or rebates involved, only the actual amount paid is relevant;

(e) if separate charges were assessed for services (e.g., a separate freight charge), such separate charges are not relevant.

Plaintiffs shall draft and submit to defendants (settling or non-settling) by December 2, 1980 a set of interrogatories designed to elicit the necessary information. Defendants' counsel shall confer with their clients to determine whether any problems exist in obtaining the required data. If a company has a problem, it shall file its objections by December 15, 1980 and shall appear at a conference on December 17, 1980, at 9:30 a.m. to assess the problems and ascertain the most effective means of arriving at a dollar figure for judgment. Any company with a problem shall be represented at the conference by a representative knowledgeable about its records and retrieval of data or by its attorney with immediate access by telephone to some such knowledgeable person.

The settling defendants have been involved in this litigation for a long time. They have assembled documents for a grand jury; many were involved in discovery in the criminal cases; all have been involved in extensive discovery and document production in this civil case. The information solicited here was requested, in somewhat different form, earlier this year. The records requested are not particularly ancient. When they settled with class plaintiffs, each defendant contracted to remain subject to this court's jurisdiction for discovery purposes; and when they objected to the prematurity and burdensomeness of the plantiffs' previous interrogatories all settling defendants understood that they would be required to answer detailed interrogatories in the event the jury found liability. Therefore, the oral objection of Stone Container, Weyerhaeuser, and McMillan Bloedel to the jurisdiction of the court to order such discovery is overruled. Defendants should keep records of their reasonable and necessary expenses incurred in this discovery.

2. Mead's motion to extend the filing date for its objections to plaintiffs' motion for proceedings preparatory to judgment is granted.

3. Pretrial Order No. 59 is amended to change the caption "MDL 310 (All Class Cases)" to "MDL 310 (All Opt-Out Cases)."

4. All class members who have filed late claims or motions to file late claims or motions to amend their claims as of December 1, 1980, are hereby granted leave so to file.

DONE this 3rd day of December, 1980 in Houston, Texas.

/s/ John V. Singleton, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. 310
(All Class Cases)

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

PRETRIAL ORDER 61

A conference was held before the court on December 17, 1980. The court has considered the motions, briefs, affidavits and arguments submitted on the various matters discussed at that conference and enters the following ORDER:

1. Plaintiffs' motion for judgment non obstante veredicto or for new trial on the issue of fraudulent concealment is DENIED.

2. Mead's motion to decertify the class is DENIED.

3. Plaintiffs' motion for judgment based on purchases of all defendants, including those found by the jury not to have been conspirators, is DENIED. The court is not ruling that class members who purchased from non-conspirators lack standing to sue, an issue which has not been presented. Plaintiffs' motion is denied because the findings of fact necessary to support such recovery were not made. Specifically, no findings were sought or made that non-conspirators' prices were excessive.

4. Mead's motion to vacate Pretrial Order No. 60 is DENIED. Mead has pointed out two allegedly erroneous statements of fact in Pretrial Order No. 60: (1) that the parties had been working on stipulations as to dollar sales of alleged coconspirators and (2) that Mead understood that there were any issues to be deferred until after verdict.

As to the first, the court in Pre Trial Order 60 stated that "plaintiffs, at the court's urging, attempted to arrive at stipulations with the dwindling number of defendants as to the dollar sales of corrugated to class members." In reviewing the record, the court finds the following colloquy on July 28, 1980, near the end of plaintiffs' case in chief:

> Mr. Baker (representing Mead): Well, the jury is entitled to know, I think—at least, this is my tentative position—what dollars you are talking about that 2.5 equals, because there's been a lot of talk here and there's a lot of market involved.
>
> The Court: Then you are going to have to get a stipulation in here about what the total sales were.
>
> Vol. 55, p. 194

The discussion continued as to the difficulty of getting the precise figures needed and Mr. Ruyak, representing Mead stated:

> We can stipulate perhaps to something like that on the estimate. We can't do it precisely each year, but there may be other ways to do it. We can put that aside right now, but that is the problem we face in getting to the damage issue in terms of dollars.
>
> Vol. 55, p. 202

Finally, after plaintiffs' counsel reurged the percentage figure submission eventually used, the discussion ended as follows:

> Mr. Arps (representing Westvaco): Our difficulty is, as Mr. Baker has pointed out here, that these are gross figures and, so far, we haven't been able to work out a method of segregating what's intra-company transactions and what were to competitors, sales to competitors.

The Court: I understood that from the very beginning.

Mr. Arps: That's right.

The Court: From the very beginning, I've been told that there are some companies that don't have that breakdown.

Mr. Arps: That's right. Maybe we can work out something. I don't know. We haven't tried to.

The Court: You'd better start working on it. That's all I'm telling you.

Vol. 55, pp. 206-208

According to Mr. Baker's affidavit, the attorneys did not in fact ever "start working on it." Plaintiffs apparently never made any effort to reach a stipulation. Of course, it was not the responsibility of defendants to do so. If there is any blame to be assessed in this regard, it lies at the plaintiffs' door. That does not, however, alter the court's decision to submit a percentage damage issue to the jury.

The second allegedly erroneous statement in Pretrial Order No. 60 is quite different. As stated in Mead's brief, it is that "[f]rom the inception of the trial, including the pretrial proceedings, the parties and the court clearly understood—and specifically stated—that the issue of damages was being tried simultaneously with the issue of liability. At no times during plaintiffs' case-in-chief or during the period Mead was presenting its defense did the court modify or change its no-bifurcation order or even suggest that damages would be separately tried to a second jury or to the court after the verdict of the jury in the box.[10]" The footnote is to a portion of Mr. Baker's affidavit not relating directly to the quoted material, but dealing with Mr. Baker's decision not to call one of Mead's expert witnesses.

The simple fact, which can hardly be other than clear to Mead's experienced trial attorneys, is that this case presented many procedural difficulties, many complex problems of proof, many legal issues as yet undecided in the substantive law of antitrust, and management problems unprecedented in this court or even in this circuit. It was, as Mead correctly states, the court's original intention that the jury be asked to find a dollar figure of damages if they found liability. The court was aware, however, from the time plaintiffs filed their proposed jury verdict sheet and jury instructions in April of 1980, that plaintiffs were contemplating a percentage submission. Mead must also have been aware of this if it read the plaintiffs' submission. It was clearly impossible to set in concrete before the trial began many decisions concerning order and manner of proof, admissibility and even availability of evidence, manner of submission to the jury, etc. To have attempted to do so could have resulted in serious injustice to the parties. The court made an effort to be flexible, to allow the parties to reurge their positions in the light of the developing case presentation, and to adjust prior rulings when necessary to avoid inconvenience, unclear presentation of evidence, unnecessary expense, or injustice. All parties received some benefits from those efforts by the court.

Turning now to Mead's specific complaint that it had no notice before verdict of the court's decision to separate out the computation of a dollar figure for determination if and only if the verdict was for plaintiffs, it is very difficult for the court to see how experienced counsel can have failed to understand the court's problem, its reasoning, and its ruling. Mead's brief quotes from the lengthy discussion of this question on July 28, just before plaintiffs rested. To quote, in pertinent part:

> The Court: What I am bothered with, Mr. Baker, is getting this case concluded in some way to get it submitted to the jury.

Now, there is one way to do it and that is to ask the jury ultimately what percentage do they find.

Another way to do it is to ask the jury to make the calculations based upon some "X" and break it down as I have suggested, and what I think I would do, and that is on a market share basis against these two defendants.

Now quite frankly, the simplest way to go about it from the jury's standpoint, is to ask them a percentage and then for us to fight out the remainder of it without the jury here.

Vol. 55, pp. 198-199

The Court: I don't know. I'm not—I'm not going to make any big final decision right now, but I am inclined to make this case to the jury as simple as possible under the evidence. And the simplest way to do it on this issue would be to ask them to find what the percentage is. That way, you have your model here, and you are going to have a model—I don't know what your model is. It might be zero. I don't know what it is. So that they'd have something to argue about on a percentage basis, which I think would be the simplest thing. And then if they were to find a conspiracy existed, if they were to find membership in the conspiracy, then we could all argue out the ultimate money without putting that to the jury.

Vol. 55, pp. 199-200

The Court: You all can scare them with that without us having to argue dollar amounts before this jury.

And I may just have to take a hardnosed attitude about this and just say that's the way we're going to do it, and we'll argue out this damage issue after we get the—

Mr. Baker: We are a long way from there now. We haven't put any evidence in. Why are we talking about what damages are going to come back?

Vol. 55, pp. 204-205

The Court: Now we are talking about a very fundamental thing, and that is, are we going to submit a damage issue to this jury or a percentage figure?

Mr. Baker: Your honor, why don't you give us a little time to see?

Vol. 55 p. 206

During the submissions and arguments about the instructions and verdict sheet for the jury this question was again briefed and discussed. Mead complains that the court overruled its motion for directed verdict based on the absence of dollar damage proof and that in denying that motion the court did not say that post-verdict proceedings would be permitted if the jury found for plaintiffs. The court is at a loss to understand what Mead thought that ruling meant if it did not realize it meant post-verdict proceedings. It virtually defies this court's experience in this case to conclude that Mr. Baker took part in these discussions, read the plaintiffs' proposed charge and verdict form, heard the court overrule Mead's motion for directed verdict, heard the court overrule Mead's objections to the proposed charge, and yet failed to realize that the computation of a dollar damage figure was being reserved for later proceedings should they be necessary.

As to the reasons for the decision, they were set out in Pretrial Order No. 60. As the Supreme Court of the United States stated in *Porter* v. *Warner Holding Co.*, "Since the public interest is involved in a proceeding of this nature, [the court's] equitable powers assume an even broader and more flexible character than when only a private controversy is at stake . . . the court may go

beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice." 328 U.S. 395, 398-99.

The court has dealt with this motion for reconsideration at some length—not because it believes Mead entertains any serious questions as to the matters embraced herein, but because it knows that this case will be appealed and hopes to clarify the record. Specifically, Mead has asked three questions:

> "1. When did the Court formally reverse its denial of a bifurcated trial, putting Mead on notice that there would be *two trials before different juries* rather than a *unitary trial* on all issues *before the same jury*?
>
> 2. If there were a "clear understanding between counsel for both parties and the Court of the issue or issues involved in each phase what proof [was] required to pass from one phase to the next," [19] and why did plaintiffs attempt to introduce evidence of gross sales on July 28, 1980?
>
> 3. If there were an understanding between counsel and the Court that the trial would be bifurcated, why did the Court leave the record open for plaintiffs' introduction of net sales to class members?"

The answer to the first is that Mead was on notice at least from July 28, 1980, that the court contemplated bifurcating this part of the damage issue. The formal ruling was made when the court ruled on the jury instructions, overruling Mead's objection and stating "I know that you object to that. No sense in us arguing. I'm going to submit it this percentage way." Vol. 94, p. 145.

The answer to the second and third is that the court and *all* the parties considered various alternative methods of proof and submission on a great many issues in this lengthy and complicated trial. The record of the July 28 conference makes it clear at least to the court that plaintiffs preferred the percentage submission but wished to have some protection in the record if the court refused to submit the case on that basis. The court left the record open for introduction of new sales in the hope that stipulations would be reached which would obviate the need for any further proceedings.

Finally, Mead contends that its inexplicable ignorance of the existence of this open issue prejudiced it in that it did not call one of its expert witnesses to rebut the evidence plaintiffs did not offer. The only issue not submitted to the jury was the dollar value of corrugated materials sold to the class. In Mead's answers to interrogatories concerning this witness's subject matter it is stated that he will testify as to the same facts and opinions as he did in the companion criminal trial. Dollar amount of sales was not in issue in the criminal case. This interrogatory answer was never modified. Indeed, it is difficult to imagine what evidence Mr. Max could have given relevant to the dollar volume of sales and irrelevant to the rest of the damage issue. Further, although Mr. Max was present in the courtroom throughout the entire trial Mead made no motion to reopen its case to put him on the stand after the court ruled on the jury instructions and verdict sheet. To take this assertion at its face value, however, the court can find no prejudice to Mead in its failure to call Mr. Max.

DONE this 9th day of January, 1981 in Houston, Texas.

/s/ John V. Singleton, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

(All Cases)

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

PRETRIAL ORDER NO. 62

A conference having been held in this litigation on January 21, 1981, and numerous matters germane to the eventual entry of judgment in the class case having been briefed and discussed, the court issues the following order:

1. Mead's motion for permission to serve written interrogatories on all class members is DENIED. Although it is true that in some cases courts have permitted discovery of absent class members, this is an uncommon procedure and one to be used only where the discovery is necessary to the proceedings. *Brennan* v. *Midwestern Life Insurance Co.*, 450 F.2d 999, 1005 (7th Cir. 1971), *cert. denied sub nom. Herriman* v. *Midwestern Life Insurance Co.*, 405 U.S. 921 (1972). Mead's proposed interrogatory would be extremely burdensome to answer. "The usefulness of Rule 23 would end if class members could be subjected to Rule 33 and forced to spend time, and perhaps engage legal counsel, to answer detailed interrogatories." *Wainwright* v. *Kraftco Corp.*, 54 F.R.D. 532, 534 (N.D. Ga. 1972). The information sought can be more efficiently and accurately obtained from the superior records of the twenty entities who sold the corrugated products. It is true that this proposed interrogatory would have the effect of eliminating

from the claimants against Mead those class members who cannot be located or do not wish to file a claim. It would also, however, probably eliminate a large number of small purchasers who would be unable to answer these detailed interrogatories or unwilling to expend the time, effort, and legal fees necessary to do so.

Mead argues that proofs of claims will eventually be necessary. This may or may not be true. Under any circumstances, the most efficient and accurate method of obtaining the information Mead seeks is from the twenty entities whose business it is to sell the products in question rather than from some two hundred thousand entities which purchased corrugated but most of whose primary business was unrelated to corrugated.

The position of Mead, that a judgment entered on figures other than those supplied by absent class members constitutes "fluid recovery," is unsound. The class representatives have proved to the jury that all purchasers were damaged by an overcharge equal to 5 percent of their purchases. The class representatives now seek proof of the actual purchases through discovery of the sellers' records. No entity not covered by the jury's verdict will recover, nor will any entity be permitted to recover more than the jury found it to be injured, plus the statutory trebling of that figure. This scheme in no way permits the enlargement of any person's substantive rights under the Clayton Act through the use of Fed. R. Civ. P. 23. A similar objection was raised to that portion of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C.A. §§ 15c-15h, which permits state attorneys general to sue civilly as *parens patriae* on behalf of their citizens for damages under the federal antitrust laws. In *In re Petroleum Products Antitrust Litigation*, 1978-1 Trade Cases ¶ 61,839 (C.D. Calif. 1978), Judge Gray overruled this objection in language equally pertinent to the case before this court:

> Recovery may be in no greater sum than [the citizens] could have obtained had they brought their own actions pursuant to section 4 of the Sherman Act (15 U.S.C. § 15). Of course, such recovery would involve treble damages, as provided in section 4, and "the trebling of damages in such cases is a statutory punitive measure." The penalty aspect of treble damages raises no present constitutional issue when the person injured is pursuing the action. To the extent that litigation under the Act is prosecuted for the benefit of the person injured and the recovery goes to such person, no greater constitutional problem could possibly arise.

¶ 61,839 at 73,496 (citations omitted).

The only question really at issue here is whether absent class members must prove their specific claims individually or whether the class representatives may do so for them, using normal discovery devices of the records of defendants. Although the court cannot find any discussion of this question in the case law, some commentators have advocated a proceeding which would significantly shorten or completely do away with the proof-of-claim proceeding. 3 NEWBERG ON CLASS ACTIONS § 4600 n. .02 (1977); A. MILLER, PROBLEMS IN ADMINISTERING JUDICIAL RELIEF IN CLASS ACTIONS UNDER FEDERAL RULE 23(b)(3), 54 F.R.D. 501, 506-509 (1972).

Additionally, there are several cases in which courts apparently have followed a similar procedure. The trial court judgment in *Boeing Co.* v. *Van Zemert* [sic], 100 S. Ct. 745 (1980), was entered in a sum determined by the fact finder to be the whole class's damages, which sum was placed in an escrow account. A master was appointed to locate class members, receive their proofs of claim, and rule on questions raised by their claims. *Boeing* at 680.

In *Eisen* v. *Carlisle & Jacquelin*, 52 F.R.D. 253 (S.D.N.Y. 1971), *rev'd*, 479 F.2d 1005 (2d Cir. 1973), *vacated*, 94 S. Ct. 2140 (1974), the trial court had outlined a similar scheme for distribution of damages in its class certification order. The court of appeals reversed because the plan included a distribution of unclaimed funds to persons not found to be injured. The Second Circuit's opinion was vacated by the Supreme Court, which specifically left open the question of whether this type of "fluid recovery"—the distribution of unclaimed or unclaimable damages to some uninjured person with interests similar to those of the class—violated a defendant's due process rights. The Second Circuit did not, however, comment unfavorably on the plan to assess damages on a class-wide basis from defendants' records—only on distribution of portions of those damages to persons who were not determined to be injured parties under the Clayton Act.

In certifying classes of purchasers in the Eastern Sugar Litigation, *In re Sugar Industry Antitrust Litigation*, 73 F.R.D. 322 (E.D. Pa. 1976), Judge Cahn overruled objections based on the supposed unmanageability of class-wide damage proof and stated, "At this time it is the feeling of this Court that the most suitable procedure for the determination of damages sustained by the proposed consumer classes in this litigation, if any, is either by an aggregate class-wide approach or through individualized evidence based on proven and accepted statistical methods." 73 F.R.D. at 351. The court went on to state:

> In this litigation, defendants have maintained records and publicly have reported sales according to classes of purchasers. Consequently, it is possible to develop accurate statistical information of total sales to [the classes] . . . . Upon the establishment of such aggregate damages as may be assessed

> against defendants, the problems of allocations among classes and distribution within each class largely becomes a plaintiffs' problem . . . .

73 F.R.D. at 353.

The procedure utilized in *Boeing* and proposed in *Sugar* and *Eisen* (but without the "fluid recovery" aspects of *Eisen*) is very similar to the procedure this court is following. In these relatively uncharted waters, the court is attempting to steer a course which protects the rights of all parties, costs no more than is necessary, and produces as accurate and expeditious a result as can be found. For these reasons, Mead's motion for discovery of absent class members is denied.

2.a. Myron M. Sheinfeld, of the law firm Sheinfeld, Maley & Kay, Houston, Texas, is hereby appointed a master in this cause, as provided by Rule 53(b) of Civil Procedure, as of January 21, 1981.

b. The master shall report on the dollar value based on actual sales prices of corrugated containers and sheets sold by The Mead Corporation and the "settled respondents" * to class members as defined by this court's order of September 6, 1978, who have elected to remain in the class, for the period March 7, 1973, through December 31, 1975.

c. In formulating his report, the master should consider that the result can be approximate and inferential. *Cf. Story Parchment Co.* v. *Patterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931); *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-65 (1945).

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* "Settled respondents" shall mean those original defendants in the class cases (other than Crown Zellerbach) who have settled with the plaintiffs' class and who were not parties to the trial but were found by the jury to be members of the conspiracy alleged by the class. Alton Box Board, who settled during the trial, is also a "settled respondent."

d. Within forty-five (45) days of the entry of this order the master should rule on objections to the interrogatories served by plaintiffs on January 23, 1981. The master may call a hearing on this issue if he finds it necessary. Answers to the interrogatories should be returned to the master and filed with the court within a period after the master's order on the outstanding objections, which period shall be set by the master. In compelling answers to the interrogatories, the master should be guided by the following principles and examples, which are based on the major common objections to the interrogatories:

i. Where the pertinent data for 1973 is not readily available for March 7, 1973, through December 31, 1973, because summary records are maintained on a monthly or annual basis, estimates should be made by prorating the data that is available, so that annual figures are reduced in proportion to the ratio of the days from March 7 through December 31, 1973, to the total number of days in 1973, where only annual figures are available, or the ratio of the days March 7 to March 31, 1973, to the total number of days in March 1973, where only monthly figures are available.

ii. Items separately invoiced which are not part of the actual purchase price, such as separately invoiced charges for freight, printing dies, cutting dies, taxes, set-up charges, warehousing charges, or machinery charges, should be excluded by deducting the actual or estimated amounts of such charges.

iii. Portions of the sales price that were billed to customers but ultimately not paid by customers, such as returns and allowances, subsequent

cash or customer discounts, and bad debts, should be excluded by deducting the actual or estimated amounts of these items.

iv. Where it is impossible or impractical to segregate the sales to opt-outs, independent corrugators, or defendants and defendants' subsidiaries and affiliates from the sales to class members, exclusion of these sales may be accomplished by estimation based on a sampling of sales for less than the entire period.

v. Where estimation is used, the party answering the interrogatory should describe the procedures used to accomplish such estimation.

vi. Wherever possible, estimates should be expressed with a high and low range.

vii. All work papers used in answering the intergatories should be retained.

viii. Any entity required to answer an interrogatory should not respond by producing source documents in lieu of an answer.

e. The master shall schedule a hearing to commence within sixty (60) days of his receipt of answers to plaintiffs' interrogatories which were served on or about January 23, 1981. The master may continue and reconvene the hearing as he deems appropriate. At the hearing, a representative of each conspirator company shall be made available for examination by the master, class plaintiffs, and defendant Mead Corporation. The representatives of each company answering these interrogatories shall be prepared to testify at such hearing about all matters relating to their answers.

f. Mead and the "settled respondents" shall submit themselves and/or their agents for examination by the master as the master may direct. In connection with any such examination, the master may exercise all powers to which he is entitled under applicable law.

g. The master is hereby authorized to consult with the court, the court's staff, representatives of the court, employees and representatives of the plaintiff class, members of the plaintiff class, employees and representatives of defendant Mead Corporation, employees and representatives of "settled respondents," and any other party or entity as the master deems necessary.

h. The master is hereby endowed with all powers to which he is entitled under applicable law.

i. It is specifically contemplated by the court that the master shall have no responsibility to resolve disputes which may arise in connection with discovery costs incurred by any party, coconspirator, or other discovered entity.

j. As soon as possible after the hearing prescribed in paragraph e, above, the master shall circulate a preliminary report on the issues listed in paragraph b. Defendant Mead Corporation and class plaintiffs shall have ten (10) days from the date on which the preliminary report is filed to respond or otherwise object to the master's preliminary report. The master may schedule hearings on these objections as he deems appropriate.

k. The master shall file with the court a final report within ninety (90) days from the last hearing described in paragraph j.

l. All motions for summary judgment on the issue of the dollar amount of damages should be submitted to the court within fifteen (15) days of the date on which the master files his final report.

m. Any response to any motion for summary judgment must be filed with the court within fifteen (15) days of the date on which the relevant motion was filed.

n. After the master has filed his final report, the court may hold hearings as it deems appropriate to resolve all

matters not previously resolved by summary judgment. At any such hearing, the master's final report shall constitute *prima facie* evidence on all issues addressed by the court. In addition, at any such hearing held by the court, the parties' arguments and evidence shall be limited to the arguments and evidence presented to the master prior to the formulation of the master's final report.

o. The master is hereby authorized to employ, without prior court approval, paralegals, law clerks, legal assistants, accounting assistants, consultants, or other staff, as the master determines are necessary to aid him in the performance of his tasks. The compensation for such employees, assistants, and staff is hereby defined as part of the "expenses" incurred by the master.

p. Having considered several options in determining how to provide for the master's compensation and his expenses, the court hereby concludes that a fund be created in the amount of $250,000. This fund shall be established in accordance with separate order of the court. From the fund, the master is hereby authorized to make periodic withdrawals in order to pay his expenses and compensate him. Such withdrawals shall be effected through the presentation of an application and proposed order to the court. *See Gary W.* v. *State of Louisiana*, 601 F.2d 240 (5th Cir. 1979).

q. The fund referred to in paragraph 16 shall be replenished as the court may direct by separate order.

r. "Settled respondents" shall maintain records of their actual and reasonable expenses incurred in this discovery procedure.

3. The parties shall have until February 4, 1981, to respond to plaintiffs' application for appointment of a fee committee.

4. The motion of Container Corporation of America for clarification or reconsideration of its order disqualifying the firm of Chadwell, Kayser, Ruggles, McGee & Hastings from further representation of Container in the opt-out cases is DENIED. Container is hereby granted a further stay until February 20, 1981, of its obligations under the ongoing discovery program in those cases.

DONE at Houston, Texas, on the 27th day of January, 1981.

/s/ John V. Singleton, Jr.
United States District Judge

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE: CORRUGATED CONTAINER
ANTITRUST LITIGATION

PRETRIAL HEARING—May 16, 1980

VOLUME I

* * * *

[60] THE COURT: Bifurcation of liability and damages, no.

MR. BAKER: What did you say on that, Judge?

THE COURT: No. I am not going to bifurcate.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. 310

(All Class Cases)

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

PRETRIAL ORDER 51

A pretrial conference having been held in this litigation on May 16, the court enters the following order:

1. Class plaintiffs' motion in limine regarding the admissibility of evidence of numerous witnesses' refusals to testify on fifth amendment grounds is GRANTED as to the following witnesses:

(a) Those who are present or former employees of Mead, Alton, Westvaco, or Crown-Zellerbach;

(b) Those who testified at the criminal trial.

The court will consider suggestions as to a format in which other witnesses who refused to testify at their depositions can be listed for the jury.

The court has given this question long and deep consideration and has studied the case law bearing on it. No reported cases have presented the serious dilemma posed here, where an unprecedented number of potential fact witnesses have refused to give evidence on what all the parties concede are somewhat attenuated fifth amendment grounds. The Court of Appeals for the Fifth Circuit has ruled that the immunity granted to these witnesses will not protect them if they repeat their testimony in this case; though the possibility that any of them might ever

be prosecuted is extremely remote, it remains a technical possibility. Their testimony, if it could be presented, could be useful to the jury. The court is faced with the problem of giving the jury evidence which is less than perfect or no evidence at all. It has therefore determined that some evidence explaining the absence of testimony from such a large percentage of those with knowledge to advance must be given to the jury and that the probative value of such evidence outweighs its possible prejudicial effect. This ruling has no bearing on the questions of what inferences may properly be drawn or on any other objections which may be raised as to individual questions and answers from the fifth amendment depositions or from the live testimony of witnesses at trial who claim the fifth amendment.

2. Plaintiffs' motion to exclude evidence of the financial condition of the parties is GRANTED as to plaintiffs. Rulings on the admissibility of evidence of defendants' financial condition will be made as the issue arises at trial.

3. Any evidence concerning class members' passing on of any overcharges shall be excluded from the trial and counsel shall not refer to pass-on in the presence of the jury without first securing the court's permission.

4. Plaintiffs' motion to unify the subclasses will be deferred until the close of evidence; the subclasses may each designate the same attorney to conduct examination of witnesses, etc., on their behalf.

5. Defendants are deemed to have made the following motions, which the court overrules:

(a) Motion to bifurcate the trial of liability and damages issues;

(b) Motion for a twelve person jury.

6. Plaintiffs' new motion to compel testimony of witnesses who have claimed the fifth amendment, on the grounds that their fear of prosecution is insubstantial, is DENIED.

7. Defendants' motion for partial summary judgment on the fraudulent concealment issue is DENIED. Fact issues remain as to what due diligence required and whether it would have disclosed grounds for suit by class members.

8. The motion of Southwest Forest Industries, Inc., to sever for trial the claims of class plaintiffs against it and for a stay of that severed trial is GRANTED.

9. The parties shall provide to each other all opinions, reports, and underlying data of their expert witnesses by May 27, 1980.

10. Plaintiffs shall by May 21, 1980, designate those portions of depositions which they propose to introduce at trial. Defendants shall counter-designate additional portions by May 23.

11. Another conference will be held at 10:00 a.m., Thursday, May 22 to discuss matters still outstanding in relation to the trial, which will begin May 27.

DONE this 23rd day of May, 1980 in Houston, Texas.

/s/ John V. Singleton, Jr.
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE: CORRUGATED CONTAINER ANTITRUST LITIGATION

TRANSCRIPT OF PROCEEDINGS

VOLUME 1

June 9, 1980

(Morning Session)

* * * *

[37] THE COURT: This alleged conspiracy, plaintiffs claim, was an agreement to fix, raise, maintain, or stabilize the prices of corrugated materials by agreeing not to compete on the basis of price through agreeing to exchange price information and to honor that exchange price information.

Under the antitrust laws of the United States, it is illegal to conspire to fix the prices of products. Plaintiffs claim that the alleged conspiracy resulted in their paying higher prices than they would otherwise have done and they are suing to recover the alleged overcharge.

The defendants deny that there was a conspiracy. They further deny that they participated in such a conspiracy, if there was one. They further deny that plaintiffs were injured and that they are entitled to any damages.

The period the plaintiffs claim the [38] conspiracy lasted was from at least 1960 through 1975.

A conspiracy is an agreement or understanding between two or more persons. The gist of the violation is an agreement or understanding of two or more persons to violate or disregard the law. Mere similarity of conduct among various persons and the fact they may have associated with each other and may have assembled together and discussed common aims and interests does not necessarily establish proof of the existence of a conspiracy. It is not necessary that the evidence show that the members of a conspiracy entered into any express or formal agreement, or that they directly, by words spoken or in writing, stated at a specific time and place precisely what their objective was or the details or means by which it was to be achieved.

However, it is necessary that the evidence show that an agreement did exist; in other words, the members of the conspiracy in some way or other came to a mutual agreement or understanding, the purpose or effect of which was to fix, raise, maintain or stabilize prices.

[39] You should pay attention to the evidence concerning each defendant and absent manufacturers of corrugated. If you find that there was an unlawful conspiracy or understanding, then you will be asked to determine which, if any, of the defendants and absent manufacturers of corrugated were participants.

All of the defendants are corporations. A corporation can act only through its agents or employees and, therefore, a corporation is legally responsible for the unlawful acts of its officers, employees, or other agents so long as the unlawful acts are done within the scope of the employment. If done within the scope of his employment, the act of an employee is legally the act of the corporation.

Under the laws of this country, one or more persons can bring a suit on behalf of a class of persons who have similar claims. This enables the parties and the courts to try a case once and settle the issues for all concerned

rather than having to try it a number of different times, with different [40] Judges and juries having to hear the same evidence and decide the same questions.

The plaintiffs in this case are suing both for themselves and for approximately 200,000 other companies who buy boxes or sheets from those manufacturers of corrugated who they claim participated in a conspiracy.

I am going to give you some background on the case you will hear in order to make the presentation of evidence more understandable. I want to emphasize again that what I say here is not evidence and that it is not to be considered by you in reaching your verdict.

About 1975, the United States Department of Justice began an investigation into possible violations of the antitrust laws in the corrugated industry. That investigation eventually led to the indictment by a grand jury of some corrugated manufacturers. Some of those indicted pled no contest; some went to trial, and all who went to trial were acquitted by the jury. That means they were found not guilty.

* * * *

[45] The plaintiffs have the burden of proving each essential element of their case by a preponderance of credible evidence. As used in these instructions, a preponderance of credible evidence means the greater weight and degree of credible evidence before you. To establish by a preponderance of the evidence means to prove that something is more likely so than not so.

In other words, a preponderance of evidence in the case means such evidence as when considered and compared with that opposed to it has more convincing force and produces in your minds belief that was is sought to be proved is more likely true than not true. In determining whether any fact in issue has been proved by a preponderance of the evidence in the case, the jury may, unless

otherwise instructed, [46] consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

* * * *

[58] You, the jury, will consider and weigh the evidence presented in order to decide whether the defendants are liable to the plaintiffs for any damages. In making [59] this decision, you will weigh and consider all of the evidence in the case, the documents and the testimony of all the witnesses, and determine under the instructions given to you by the court whether or not the plaintiffs have proved by a preponderance of the credible evidence that the alleged conspiracy existed and that a defendant has participated in that conspiracy and that such participation damaged the plaintiffs.

* * * *

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE: CORRUGATED CONTAINER ANTITRUST LITIGATION

TRANSCRIPT OF PROCEEDINGS

July 22, 1980

VOLUME 49

(Morning Session)

* * * *

[105] Q [By Plaintiffs' Counsel Mr. Susman]: All right. Mr. Beyer, could you now explain just what that chart represents?

A: It represents the—what the prices would have been, [106] shown here by the dotted line, the difference between them, had there been no collusion, no collusive activities during this period.

This represents an average of 7.8 per cent. Begins with a transition point at the end of 1977, working back.

So during this period of time during 1976, in fact, that percentage difference is smaller. There was some impact and some injury even after 1975, because of the lingering effects of the collusive activities, but on the average—prior to 1975, 1976, the average is 7.8 per cent.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE: CORRUGATED CONTAINER ANTITRUST LITIGATION

TRANSCRIPT OF PROCEEDINGS

July 22, 1980

VOLUME 50

(Afternoon Session)

* * * *

[222] Q [By Defendant's Counsel Mr. Raines]: All right. You have not attempted to identify which of any of these 220,000 purchasers was charged any particular price? You cannot make your testimony specific as to this jury as to whether any of the people that have testified, Gerber, whether or not prices with regard to them were 7.8 percent higher or lower?

You have not attempted to analyze that on a specific basis?

A We have not looked at each and every purchaser. We have taken the information that is available to us, looked at this in terms of the national averages that we—and the data that were available; looked at it in terms of its geographical impact and arrived at a conclusion, which were described, and for reasons, I think, that are set out fairly clearly both this morning and earlier this afternoon, that as a result of the analysis we did, that we could expect that all purchasers were injured. Some may have been injured more than others.

I am not saying that every purchaser was affected exactly the same way, but that all purchasers were injured.

And it is both neither feasible to go [223] through 220,000 purchasers because we would have to do exactly the same kind of analysis, nor would it be necessary in order to arrive at a reasonable conclusion.

Q And it wasn't done?

A No. It wouldn't have been feasible to have done that and, as I just mentioned, it would not have been necessary in order to arrive at a reasonable conclusion that all purchasers were injured as a result of this collusive behavior.

Q And it wasn't done? I mean, the question, I assume, is simply it was or it wasn't done.

My question is, it wasn't done?

A No. And I have given you the reasons why.

Q I understand that. Now, you have a bottom line estimate of 7.8 and a top estimate of 19.1. Is that correct?

A No. The 19.1 is not a top estimate. The 19.1 represents what was the general overcharge, and it is possible, it is very probable, that there were purchasers who were injured by more than that.

* * * *

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE: CORRUGATED CONTAINER ANTITRUST LITIGATION

TRANSCRIPT OF PROCEEDINGS

July 28, 1980

VOLUME 55

(Afternoon Session)

* * * *

[188] How about the answers to the interrogatories?

MR. RUYAK: Your Honor, we have an objection to those. Plaintiffs seek to admit answers to interrogatories on gross sales of a number of defendant corporations, which include intracorporate sales for those companies and sales between defendants.

It is our understanding that this case involves if any sales, sales to other than those two sources and they are not broken down in the answers to interrogatories.

If the plaintiffs are going to use those figures, Your Honor, they are [189] incorrect for anything because they include intracorporate and sales to other defendants.

MR. SUSMAN: Your Honor, these are the interrogatories that we sent out. These were the answers to the interrogatories on damages.

We request permission to put them in evidence. We do not intend to make any use of them.

We have never gotten around, unfortunately, to discussing with the court the charge in this case. We have suggested to the court that a special verdict go to the

jury to find a percentage overcharge and to find who participated in the conspiracy.

And if that is the way the court is going to submit the case, which is what we recommend, it is unnecessary to put any of this in because, subsequent to the conclusion of the trial—

THE COURT: I had thought that it would be—without you even bringing it up—that that is the way I would * * *

* * * *

[212] fact what is the damage dollar impact here.

THE COURT: But, we can't do it if you don't get these gross sales here.

MR. BAKER: That's what I'm saying. Let us work on that.

MR. BLACK: You'll have to be a little flexible with us in terms of demanding that we close our case immediately if we are going to work on that.

MR. BAKER: Maybe your case can be closed subject only to.

THE COURT: That's fine.

MR. BLACK: Sure, something like that.

THE COURT: Let's close it subject to you doing something.

MR. ARPS: I want to be dead sure that it's subject to that single item, because you keep opening the door and opening the door.

THE COURT: I am not going to let them reopen this case.

MR. BLACK: We don't want to.

* * * *

LETTER OF HAROLD F. BAKER

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HAROLD F. BAKER
(202) 383-7039

September 6, 1980

Honorable John V. Singleton, Jr.
United States District Court
Southern District of Texas
515 Rusk Avenue
Houston, Texas 77002

Re: Corrugated Container Antitrust Litigation
MDL No. 310

Dear Judge Singleton:

This is in reply to Plaintiffs' Memorandum In Support of Their Proposed Special Verdict Form. In addition to this quick letter reply, we would like to be heard on this issue because it is of paramount importance.

The reference to the *Plywood Cases* is totally inapposite for the following reasons, among others:

(1) In *Plywood* the principal question involved was the utilization of "West Coast Freight," *i.e.*, a standard ascertainable charge from Portland, Oregon, to the destination of each plywood delivery. There was no question as to the amount; it was simply a matter of looking at the freight rate book. Hence, the damage calculation was uniform and consistent, once the initial question of liability as to the use of "West Coast Freight" with respect to each and every shipment was decided adversely to defendants.

(2) In this case, as the Court knows, there was no such uniform damage principle that automatically follows a finding of liability. Plaintiffs themselves have come up with various percentages and ranges of percentages and Mr. Beyer himself testified categorically that the amount of damage with respect to individual purchasers was variable.

(3) The evidence shows vast segments of the market (both geographic and product) which, under no stretch of the imagination, could fit into the application of a standardized uniform overcharge percentage. That is totally different from the *Plywood Cases*. In this connection plaintiffs' proof through Mr. Beyer and otherwise deals only with claimed average overcharges in broad and speculative ranges and does not even purport to deal with uniform overcharges by either class of product, *e.g.*, commodity boxes vs. high-value-added boxes, fresh fruit and vegetable boxes vs. beef breaker boxes, etc., nor do plaintiffs or Beyer purport to deal with damage factors on the basis of varying geographic markets which have been the subject of varying quantum and quality of proof. For example, the proof as to the Denver, Kansas City or St. Joe market is not comparable with the proof with respect to proof in other markets.

(4) The exact same observations are true with respect to the "standard weights" involved in the *Plywood Cases*. These were mathematically precise, assumed weights for carloads of plywood, irrespective of actual weights. Hence, if the standard weights were declared to be an illegal part of the conspiracy, the application of damages simply required a calculation as between actual weights of each carload and the standard weight used in pricing.

(5) Once the question of liability was decided in *Plywood* on the basis of "West Coast Freight" and "standard weights," no issue of damage fact remained but only questions of calculation. That is totally untrue in the

instant case. Both the fact of and the amount of damage are in dispute factually, and there is no liability finding that the jury can be asked to make that circumvents findings of impact and the damage with respect to specific markets, both geographic and product, even assuming over defendant's objections that plaintiffs are allowed to seek from the jury multiple verdicts based on multiple sections of the country, contrary to the allegations of the complaint and the theory upon which it has been tried.

(6) The Court in this case specifically declined to grant a bifurcated trial and ordered that the issues of liability and damages would be tried together. To now change that ruling, as plaintiffs suggest, and have the Court determine disputed issues of fact as to impact and damages in the event liability is found would be unfair, constitute a denial of due process and a denial of trial by jury.

Respectfully submitted,

/s/ Harold F. Baker
HAROLD F. BAKER

cc: Counsel for Plaintiffs

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE: CORRUGATED CONTAINER ANTITRUST LITIGATION

TRANSCRIPT OF PROCEEDINGS

September 8, 1980

VOLUME 94

(Afternoon Session)

* * * *

[145] MR. BAKER: Down in the next paragraph, "you are asked to find the amount of the overcharge, if any, in terms of percentage." I want in terms of a dollar overcharge.

THE COURT: Oh, I know that. I know that you object to that. No sense in us arguing. I'm going to submit it this percentage way.

MR. BAKER: Well, how are you ever going to come up with damages?

THE LAW CLERK: Multiply it by sales during whichever period they find from whichever suppliers they find were members of the conspiracy.

MR. SUSMAN: Or claims.

MR. BLACK: Or claims.

MR. MONTAGUE: Apply that to the claims.

[146] MR. BAKER: Well, let me continue and I'll come back to that. I think it's wrong and we take exception to it.

THE COURT: I know you do.

MR. BAKER: And I think—

THE COURT: I don't see how I can submit it any other way.

MR. BAKER: Well, I can suggest how you can submit it.

THE COURT: How? There is no dollar figure here for them to find.

MR. BAKER: They have claims that were made here by the class members against the settlement funds and they know exactly what those claims are.

MR. BLACK: But the people who didn't file claim forms aren't precluded from filing—

THE COURT: That is not in evidence here.

MR. BAKER: It is their burden of proof.

THE COURT: I understand your point is that if they have failed to prove damages, that's just too bad, [147] they failed.

MR BAKER: You bet your life.

THE COURT: But I'm stuck with a charge on what has been put into evidence in this case, and if the plaintiffs—

MR. BAKER: Well, then, I'm entitled to a directed verdict right now.

THE COURT: I understand your point.

MR. BLACK: Can I reserve my one—my one—

THE COURT: I understand exactly.

MR. BAKER: I haven't even used my full allotted time, your honor.

THE COURT: Yes, you have.

MR. BAKER: No, I haven't.

THE COURT: Let's not argue about that because I'm stuck with it, right or wrong, it looks like to me.

* * * *

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE: CORRUGATED CONTAINER ANTITRUST LITIGATION

* * * *

TRANSCRIPT OF PROCEEDINGS

September 9, 1980

VOLUME 95

(Morning Session)

* * * *

[63] THE COURT: Just put the numbers in.

Diane, they offered them in evidence, I sustained the objection to them on the basis that they are not relevant to any issue before the jury.

MR. COHEN: And that's Exhibits 4929 [64] through—

THE COURT: I assume your objection includes an objection on relevancy?

MR. RUYAK: Yes. Simply stated, because they do not show the sales that the class would have had. They include intracorporate sales, they include sales to opt-outs, and they include sales to other defendants, and therefore they are not accurate dollar sales to the class by year.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE: CORRUGATED CONTAINER ANTITRUST LITIGATION

TRANSCRIPT OF PROCEEDINGS

September 9, 1980

VOLUME 96

(Afternoon Session)

* * * *

[292] MR. BAKER: I've got a motion.
THE COURT: And you want a motion for judgment?
MR. BAKER: Yes.
THE COURT: I overrule that.

* * * *

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE: CORRUGATED CONTAINER ANTITRUST LITIGATION

TRANSCRIPT OF PROCEEDINGS

September 11, 1980

VOLUME 100

(Morning Session)

* * * *

[14] THE COURT: Mr. Baker, you filed a motion, directed verdict, concerning the sheet plant.

MR. BAKER: We also want to file a motion to decertify the class, and I hereby file such a motion.

THE COURT: Okay. Just take it that you filed the motion to decertify the class and I overruled it.

File your motion for directed verdict, [15] which I have studied and overruled.

MR. BAKER: All right. Do we file a separate motion for directed verdict on the sheet plant class?

MR. RUYAK: Yes.

MR. BAKER: I just want the record to show it's also on the sheet plant.

THE COURT: That's correct. That's the one you just handed me about 30 minutes ago.

* * * *

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE: CORRUGATED CONTAINER
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:
ALL CLASS ACTIONS

SPECIAL VERDICT

WE, THE JURY, UNANIMOUSLY FIND AS FOLLOWS:

1. Was there a combination or conspiracy (as defined in the Instructions) involving two or more corrugated producers to fix, raise, maintain, or stabilize or to otherwise affect prices of corrugated materials by agreeing not to compete on the basis of price or agreeing to exchange price information, which agreement had the purpose of affecting, or did in fact affect, prices paid for containers and sheets sold throughout the United States.

Yes

(Yes or No)

(If your answer to Question 1 is No, your verdict is for defendant and you should answer no further questions.)

2. If your answer to Question 1 is yes, was the Mead Corporation a member of the combination or conspiracy?

Yes

(Yes or No)

(If your answer to Question 2 is No, your verdict is for the defendant and you should answer no further questions.)

3. If your answer to Questions 1 and 2 is yes, were any of the following companies also members of the combination or conspiracy?

Alton Box Board Co.	Yes
	(Yes or No)
Boise Cascade Corp.	Yes
	(Yes or No)
The Chesapeake Corporation of Virginia	No
	(Yes or No)
Consolidated Packaging Corporation	Yes
	(Yes or No)
Container Corporation of America	Yes
	(Yes or No)
The Continental Group, Inc.	Yes
	(Yes or No)
Corco, Inc.	No
	(Yes or No)
Crown Zellerbach Corporation	Yes
	(Yes or No)

Diamond International Corporation	No
	(Yes or No)
Dura-Containers, Inc.	No
	(Yes or No)
Fibreboard Corporation	No
	(Yes or No)
Georgia-Pacific Corporation	No
	(Yes or No)
Green Bay Packaging, Inc.	No
	(Yes or No)
Hoerner Waldorf Corporation (Champion International Corporation)	Yes
	(Yes or No)
Inland Container Corporation	Yes
	(Yes or No)
International Paper Company	Yes
	(Yes or No)
Interstate Container Corporation	Yes
	(Yes or No)
Longview Fibre Company	No
	(Yes or No)
MacMillan Bloedel Companies	Yes
	(Yes or No)

Menasha Corporation	No
	(Yes or No)
Olinkraft, Inc.	Yes
	(Yes or No)
Owens-Illinois, Inc.	Yes
	(Yes or No)
Packaging Corporation of America	Yes
	(Yes or No)
Potlatch Corporation	No
	(Yes or No)
St. Joe Paper Company	Yes
	(Yes or No)
St. Regis Paper Company	Yes
	(Yes or No)
Southwest Forest Industries, Inc.	Yes
	(Yes or No)
Stone Container Corporation	Yes
	(Yes or No)
Union Camp Corporation	No
	(Yes or No)
U.S. Corrugated Fibrebox Company	No
	(Yes or No)

Western Kraft East, Inc.	No
	(Yes or No)
Weyerhaeuser Company	Yes
	(Yes or No)
Willamette Industries, Inc.	No
	(Yes or No)

4(a) If there was a combination or conspiracy, did it begin before January 1, 1964 and continue at least until December 31, 1975?

Yes

(Yes or No)

If the answer above is No, specify during what period the combination or conspiracy existed. _____

(Specify)

(b) Did Mead or any other participant company withdraw from the combination or conspiracy prior to December 31, 1975?

Yes

(Yes or No)

If so, indicate which company and on what date.

Defendant or Other Company	*Date*
Crown	January 1970

(Use a separate sheet if more room is necessary.)

5. If in your response to Question number 3 you found that the combination or conspiracy began prior to March 7, 1973, answer the following:

(a) Did the participants conceal the combination or conspiracy through affirmative acts of concealment?

No

(Yes or No)

(b) Did sheet plant plaintiffs exercise reasonable diligence in regard to discovering the existence of the combination or conspiracy? No

(Yes or No)

(c) Did plaintiffs other than sheet plant purchasers exercise reasonable diligence in regard to discovering the existence of the combination or conspiracy? No

(Yes or No)

(d) If the sheet plant purchasers of corrugated containers and sheets had conducted a reasonable investigation after they had cause to investigate, could they have discovered the existence of the combination or conspiracy through the exercise of reasonable diligence. Yes

(Yes or No)

(e) If the purchasers of corrugated containers and sheets other than sheet plants had conducted a reasonable investigation after they had cause to investigate, could they have discovered the existence of the combination or conspiracy through the exercise of reasonable diligence. No

(Yes or No)

6(a) If your answer to Questions 1 and 2 is Yes, did the combination or conspiracy cause financial damage to the sheet plants in their purchases of corrugated containers and sheets throughout the United States? Yes

(Yes or No)

(b) If your answer to Questions 1 and 2 is Yes, did the combination or conspiracy cause financial damage to

purchasers other than sheet plants in their purchases of corrugated containers and sheets throughout the United States? Yes

(Yes or No)

7(a) If your answer to Question 6(a) is Yes, state by what percentage of the purchase price sheet plants were damaged. 5%

(Fill in percentage figure)

(b) If your answer to Question 6(b) is Yes, state by what percentage purchasers other than sheet plants were damaged. 5%

(Fill in percentage figure)

September 13, 1980

/s/ Carolyn R. Keyes
CAROLYN R. KEYES

Foreperson

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE: CORRUGATED CONTAINER ANTITRUST LITIGATION

TRANSCRIPT OF PROCEEDINGS

September 13, 1980

VOLUME 102

* * * *

[48] MR. BAKER: My view is that the court has no power, authority or jurisdiction to do anything but discharge the jury and enter a judgment in accordance with the verdict.

THE COURT: Okay. Fine.

MR. SUSMAN: That's fine. I don't see there's anything we can do.

THE COURT: All right. Anything else?

MR. BAKER: Could we have permission to talk to the jurors?

THE COURT: Yes. If you'll wait around, I'll let you talk to them, if you want to.

Okay. I am first going to go back there and thank them for myself, and then I'll bring them in here and let you talk to them, if you want to, Mr. Baker, any of you. I'm going to tell them.

Okay.

[49] MR. SUSMAN: Thank you.

(Court excused the jurors at 3:55 p.m.)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL 310

IN RE: CORRUGATED CONTAINER ANTITRUST LITIGATION

This Document Relates To All Class Action Cases And To Post-Verdict Special Master

---

NOTICE OF MASTER'S HEARING

TO: Stephen D. Susman, Esq., Chairman, Plaintiffs' Steering Committee, Susman & McGowan, 806 Main Street, 21st Floor, Houston Texas 77002

Harold F. Baker, Esq., Counsel for Mead Corporation, Howrey & Simon, 1730 Pennsylvania Avenue, N.W., Washington, D.C. 20006

John D. Roady, Esq., Counsel for Settled Respondents, Hutcheson & Grundy, 3300 Two Allen Center, Houston, Texas 77002

Please take notice that the Master's Hearing in connection with Plaintiffs' Interrogatories to Mead Corporation and Settled Respondents Concerning Sales to Class Members will be held in Houston, Texas at 10 o'clock a.m. on April 8, 1981, in Judge Hannay's Courtroom No. 4, Ninth Floor, United States Court House, 515 Rusk Avenue.

Any objections to such interrogatories, if not already filed, are to be filed with the Court and the Master by April 3, 1981, and served upon the Chairman of Plaintiffs' Steering Committee and counsel for Mead Corporation so as to be received by them on or before April 3, 1981.

Dated: March 24, 1981

MYRON M. SHEINFELD, Special Master
Sheinfeld, Maley & Kay
2130 Two Shell Plaza
Houston, Texas 77002
(713) 224-3640

Office-Supreme Court, U
FILED
MAY 9 1981
ALEXANDER L. STEVA
CLERK

No. 80-1686

IN THE

Supreme Court of the United States

October Term, 1980

IN RE CORRUGATED CONTAINER ANTITRUST LITIGATION

THE MEAD CORPORATION,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, et al.,
Respondents.

BRIEF OF THE REAL PARTIES IN INTEREST IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Dated: May 7, 1981

* Counsel of Record

COUNTER-STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Was the Court of Appeals within its discretion in declining to issue a writ of mandamus to grant interlocutory review of the District Court's discretionary decision to bifurcate one narrow issue concerning damages from the issues of violation, impact, and class-wide measure of damages in the jury trial of this complex antitrust litigation?

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No. 80-1686

IN THE

Supreme Court of the United States

October Term, 1980

IN RE CORRUGATED CONTAINER ANTITRUST LITIGATION

THE MEAD CORPORATION,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, ET AL.,

Respondents.

BRIEF OF THE REAL PARTIES IN INTEREST IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Real Parties in Interest to these proceedings, the representative plaintiffs and the certified plaintiff class in the multidistrict Corrugated Container Antitrust Litigation (M. D. L. No. 310) now pending in the United States District Court for the Southern District of Texas, respectfully oppose the petition for certiorari in the within matter.

STATEMENT OF THE CASE

A. Preliminary Statement

After nearly four months of trial, a jury in the United States District Court for the Southern District of Texas found that Petitioner Mead had participated for many years in a price-fixing conspiracy that damaged all purchasers of corrugated containers and corrugated sheets throughout the United States by a minimum of 5% of the purchase prices paid. (Pl. App. at A1-A7).[1] Before submitting the case to the jury, the District Court bifurcated the issue of calculating the dollar amount of damages from the issues of liability, impact, and classwide measure of damages. The measure of damages was submitted to the jury as a percentage overcharge. The bifurcated issue of calculating the dollar amount of damages consists of determining the dollar amount of sales by conspirator manufacturers to class members, then multiplying by the classwide percentage measure of damages.[2] The damage calculation proceedings are now under way in the District Court.

Petitioner Mead seeks through these mandamus proceedings to avoid or delay the consequences of the jury's verdict, without waiting for the verdict to be reduced to final judgment.[3] The Court of Appeals unanimously denied the present mandamus application within four days of receiving plaintiffs' response thereto.

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1. Copies of portions of the record cited herein are included in the Appendix to this Brief in Opposition. That Appendix is cited as Pl. App. at —; the Appendix to Mead's Petition is cited as Mead App. at —.

2. See discussion at p. 6, *infra*.

3. Mead has an obvious financial motive to delay the entry of judgment. Post-judgment interest, even at 6%, could amount to as much as $5 million per month.

Mead's petition misstates and distorts the record in a number of important respects. In the first place, Mead attempts to portray the proceedings below as a reopening of the trial record, to cure a purported "failure of proof", when in fact the trial court merely bifurcated a single damage issue (calculation of the dollar amount of damages) from the remaining issues of violation, impact, and measure of damages, before submitting the latter issues to the jury. Plaintiffs never asked for a reopening of the record, and the District Court never ordered one at plaintiffs' request.[4] Mead has created the fiction of a reopening because the real proceedings below are not susceptible to legitimate criticism.

Mead's petition also creates the false impression that the District Court misled the parties throughout the trial into believing that no issues would be bifurcated, and that the bifurcation did not take place until after the trial was over. The truth is that many events, including the court's class certification opinion more than a year before the trial,[5] the submission of plaintiffs' proposed pretrial order with a proposed special verdict form,[6] and many discussions among the court and all parties in the course of pretrial and trial proceedings, served to alert everyone concerned that the District Court had been requested to and

4. The only reopening of the record took place at Mead's request, to allow Mead, after resting, to introduce additional evidence. (Tr. Vol. 85 at 80-81, Pl. App. at A102; Tr. Vol. 96 at 109-143, Pl. App. at A103-A123.)

5. *In re Corrugated Container Antitrust Litigation*, 80 F. R .D. 244, 253 (S. D. Tex. 1978), *mandamus denied*, No. 78-3684 (5th Cir. Dec. 29, 1978).

6. The proposed special verdict form provided only for a percentage finding as to the classwide measure of damages, and not for any finding as to the aggregate dollar amount of damages. Pl. App. at A8-A13.

was seriously considering reserving for separate proceedings the issue of calculating the dollar amount of damages.[7] The District Court definitively bifurcated the damage calculation issue before either side had closed its case. Indeed, Mead reopened its case after the bifurcation decision and introduced additional evidence. (Tr. Vol. 95, at 80-81, Pl. App. at A102; Tr. Vol. 96, at 109-43, Pl. App. A103-A123).[8] The statements in the petition that the case was not bifurcated until after the end of the trial (e.g., Petition, pp. 9, 20-21) are simply false.[9] Mead's

7. The colloquy among counsel and the court on July 28, 1980, at the close of plaintiffs' case-in-chief demonstrates beyond doubt that Mead understood before its defense began that the Court intended to bifurcate the trial and submit only the measure of damages issue to the initial jury. Tr. Vol. 55, pp. 177, 180-81, 210-13 (Pl. App. at A83-A88).

8. Just prior to trial Mead and the other defendants indicated their intention to make a number of motions, among them a motion to bifurcate *all* "damage" issues from the "liability" issues. Defendants' Preliminary Pretrial Order, ¶ IV4 (Pl. App. at A17). The District Court deemed such a motion to have been made and denied it on May 23, 1980 (Mead App. at 30a). Despite Mead's claim to the contrary, the court never modified or reversed that decision—to deny bifurcation of all "damage" issues—and the case went to the jury on all issues of liability and damages, save the last mechanical step of applying the jury-determined measure of damages to sales figures in order to arrive at the dollar amount of damages.

Because it related to all "damage" issues, the defendants' proposed bifurcation differed greatly from the narrow, single-issue bifurcation ultimately adopted by the District Court. Mead's petition is grossly misleading to the extent it portrays the two bifurcations as the same, thereby seeking to create the false impression that the District Court misled Mead by at first denying its bifurcation motion and then later adopting the very same bifurcation.

9. Contrary to the unsupported assertions of the petition, the trial court's actions were in no way a departure from accepted judicial practice. Many cases have approved bifurcation decisions

argument concerning a post-trial bifurcation thus has no application to *this* case.

Another misleading theme running through the Mead petition is that plaintiffs tried and failed to prove the dollar amount of damages before the initial jury. The fact is that plaintiffs declined to submit proof of the dollar amount of damages only after the District Court had decided to bifurcate that issue and not submit it to the initial jury. Plaintiffs had sought to introduce evidence of dollar sales figures on several occasions throughout the trial, and on each occasion Mead objected. On September 9, 1980, the day before the case went to the jury, the District Court ruled, and both plaintiffs' counsel and counsel for Mead agreed, that such evidence was immaterial in light of the bifurcation. Tr. Vol. 95, pp. 62-65 (Pl. App. at A99-A101). There was thus no failure of proof, as Mead claims, but rather the simple recognition of the practical and legal effect of the bifurcation.[10]

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9. (Cont'd.)
reached after trial is underway, or indeed concluded. *E.g., Warner v. Rossignol*, 513 F. 2d 678, 684 (1st Cir. 1975); *Braun v. Berenson*, 432 F. 2d 538, 543 (5th Cir. 1970); *cf. Franchi Constr. Co., v. Combined Insurance Co. of America*, 580 F. 2d 1 (1st Cir. 1978); *Fradette v. American Serv. Corp.*, 1979-1 Trade Cas. ¶ 62,556 (S. D. Fla. 1979).

10. To accept Mead's version of what happened, this Court would have to believe that plaintiffs' experienced antitrust counsel knowingly allowed their case to go to the jury with *no* evidence on an essential element of proof and were thus either extremely stupid, grossly neglectful, or downright suicidal. The far more plausible explanation of plaintiffs' behavior—and indeed the factual explanation—is that plaintiffs, like everyone else including Mead, had a clear understanding that the damage calculation issue was being reserved, so that evidence of dollar sales was not only unnecessary at that stage of the proceedings, but immaterial as the District Court had ruled. Tr. Vol. 95 at 63-65, Pl. App. at A99-A101.

Finally, Mead omits to tell this Court that the District Court has explicitly ordered that a second jury will decide any contested issues of fact that arise in applying the measure of damages to calculate the amount of judgment.[11] Therefore, the proceedings below do not and will not deny Mead a jury trial of any genuine issues of material fact.

As these few examples demonstrate, many of the facts Mead claims in its petition to be undisputed (Petition, pp. 5-10) are not only disputed, but false.[12]

B. Statement of Facts

The trial below lasted for more than three months. Plaintiffs presented the testimony of more than 30 witnesses from all over the United States who established to the satisfaction of the jury the existence of an extensive price-fixing conspiracy in the corrugated industry. The proof showed there was a general agreement in the corrugated industry to refrain from competing on the basis of price; that competitors would exchange price information whenever requested; that competitors would "honor", *i.e.*, not undercut, the prices exchanged; and that competitors would be "constructive in the market place" by refusing to undercut even those prices that were not subject to exchange.[13] The agreements were enforced, the evidence

11. Pretrial Order No. 60 (December 3, 1980), Mead App. at 6a-7a. Pretrial Orders of the District Court are cited as "PTO No. —."

12. The statement at pages 6-7 of the Petition, that Mead moved for a directed verdict based on a purported failure of proof of damages, is particularly egregious. Mead never moved for a directed verdict on that ground, either at the close of plaintiffs' case, the close of all evidence, or at any other time.

13. *E.g.*, Tr. Vol. 7 at 288, 292-93, Pl. App. at A73-A75 (witness Norman Lacey); Tr. Vol. 12 at 263-64, Pl. App. at A76-A78 (witness Ralph Redmond); Tr. Vol. 33 at 14, Pl. App. at A81-A82 (witness

showed, by retaliation and by pressures asserted in conjunction with trade association meetings.[14]

Direct evidence implicated numerous present and former Mead management-level employees in price-fixing activities.[15]

As noted above, the trial court in the exercise of its discretion bifurcated the single, narrow issue of the dollar amount of the conspirators' sales to class members prior to submission of the case to the jury. The court submitted the case in the manner urged by plaintiffs prior to and during the trial, with the jury instructed to make its findings by way of special verdicts.

After deliberating for three days, the jury found in favor of plaintiffs and the class and against Mead, finding by way of special verdicts: (1) that Mead was a member of a price-fixing conspiracy in the corrugated industry that continued for at least twelve years; (2) that nineteen of the 36 other manufacturers named in the Complaint had also been members of the conspiracy; (3) that the conspiracy caused financial damage to all purchasers of corrugated containers and corrugated sheets throughout the United States; and (4) that all such purchasers were damaged by a minimum 5% overcharge.[16]

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13. (Cont'd.)
Edward Schechter); Tr. Vol. 6 at 79-81, Pl. App. at A64-A65; Tr. Vol. 6 at 94-98, Pl. App. at A68-A70; Tr. Vol. 6 at 132-33, Pl. App. at A71-A72 (witness Alex Hopkins); Tr. Vol. 17 at 36, Pl. App. at A79-A80 (witness James Danahey).

14. *E.g.*, Tr. Vol. 6 at 91-94, Pl. App. at A66-A68 (witness Alex Hopkins).

15. Tr. Vol. 85 at 202-17, Pl. App. at A89-A98 (witness Robert Neff); Tr. Vol. 97 at 44-45, 63-64, Pl. App. at A124-A126.

16. The jury found in Mead's favor on the issue of fraudulent concealment, thus limiting the period for which damages may be recovered to approximately two years and ten months.

In light of the jury's special verdicts, the only task necessary to determine the dollar amount of the judgment to be entered was to ascertain the appropriate dollar sales or purchase figures, multiply by the jury's 5% measure of damages, and treble the resulting figures.[17] In October, 1980, plaintiffs moved the District Court to establish a procedure for accomplishing that task.[18] Plaintiffs suggested that the jury's verdict be applied to the sales figures of those manufacturers whom the jury found to have been members of the conspiracy,[19] and that the court appoint a special master pursuant to Rule 53 to gather the sales data for the appropriate periods of time,[20] to eliminate sales to

17. The task of calculating the dollar amount of damages has been greatly simplified by the jury's verdict, which has reduced the time period of recovery to about 2¾ years, and has eliminated the sales of 17 manufacturers. Had the District Court not bifurcated the calculation issue, the parties would have had to introduce sales or purchase evidence covering 18 years, instead of 2¾, and 37 manufacturers, instead of 20; the Court would have had to instruct the jury how to deal with the damage data depending on the many possible permutations of findings the jury might have made concerning the membership and temporal scope of the conspiracy, fraudulent concealment, and so forth; and the jury would have had to cope with sorting out the proper data to be used consistent with its various findings. The elimination of such unnecessary burden and complexity for the parties, the jury, and the Court, points up the wisdom of the District Court's bifurcation decision.

Of course, some part of the prior settlements will also have to be credited before judgment is entered.

18. Memorandum in Support of Plaintiffs' Motion for Proceedings Preparatory to Entry of Judgment. (Pl. App. at A43.)

19. By PTO No. 61, ¶ 3 (Mead App. at 10a), the District Court rejected plaintiffs' contention that Mead was liable for the sales of all manufacturers, whether or not they participated in the conspiracy. *Compare In re Beef Industry Antitrust Litigation*, 600 F. 2d 1148, 1166 & n. 24 (5th Cir. 1979).

20. Because of the jury's verdict on fraudulent concealment, the District Court has ruled that plaintiffs may recover only on the

persons who are not class members, and to report on the appropriate dollar amount of the judgment to be entered. Plaintiffs have always taken the position, and the District Court has ruled, that Mead would be entitled to a jury trial of any genuinely disputed issue of material fact that arose in the course of calculating the dollar amount of damages.[21]

In response, Mead argued that no special master should be appointed, and that in any event the measure of damages should be applied to purchase figures solicited from the 200,000 class members, rather than to sales figures available from the 20 conspirator manufacturers.

After several hearings, the District Court decided to appoint a special master and to base the damage calculations on sales data rather than purchase data. PTO No. 62 (Mead App. at 18a) [22] thus provides for the appointment of a special master to report to the court on the dollar amount of sales by Mead and its co-conspirators to the members of the class in the appropriate time period. PTO No. 62 provides, further, that the court will thereafter entertain motions for summary judgment on the dollar amount of damages and then conduct a hearing on any disputed factual issues (PTO No. 62, ¶¶ 2 *1*, 2 n, Mead

20. (Cont'd.)
basis of sales in the period March 7, 1973, through December 31, 1975 (PTO Nos. 60 and 61, Mead App. at 8a, 10a).

21. The Memorandum in Support of Plaintiffs' Motion for Proceedings Preparatory to Entry of Judgment (Pl. App. at A58) specifically stated at p. 10 that the application of the measure of damages "may be submitted to another jury if that issue is not resolved by summary judgment . . . ." See also, *id.* at p. 2, Pl. App. at A48 ("Genuinely disputed issues of fact . . . may be submitted to a jury.") Likewise, Plaintiffs' Memorandum in Support of Their Proposed Special Verdict Form, dated September 5, 1980, at p. 7 (Pl. App. at A26) states that "Any outstanding factual issue remaining would then be submitted to a jury for determination."

22. 1980-81 Trade Cas. ¶ 63,810 (S. D. Tex. 1981).

App. at 24a, 25a). The court had ruled in an earlier order that, "In the unlikely event that a contested issue is raised by the sales figures, . . . it can be dealt with by empaneling another jury." (PTO No. 60, Mead App. at 6a, 7a.)

Following the master's appointment, the plaintiffs and the master drafted six interrogatories to solicit the pertinent sales data from the twenty manufacturers involved.[23] These interrogatories were served on the manufacturers and, by order of the special master, responses were due February 23, 1981.

It was at that point, without waiting for final judgment to be entered, that Mead filed the present petition for mandamus.

After the Court of Appeals denied the mandamus petition, the special master heard and determined all objections to the sales interrogatories and has ordered that the required data be submitted to him by June 22, 1981.

23. Mead was present at that hearing, made comments on the proposed interrogatories (some of which were adopted) but refused to adopt or endorse the interrogatories.

ARGUMENT

The petition should be denied for the following reasons:

A. Mead's Attempt to Secure Review of the District Court's Interlocutory Bifurcation Decision Is Premature. Review Should Await Entry of Final Judgment.

Mead's petition brings to this Court the Court of Appeals' refusal to grant interlocutory review, by way of mandamus, of the District Court's discretionary bifurcation decision. The mere statement of the procedural posture of this matter demonstrates that Mead's petition for mandamus is premature and does not meet the stringent standards established by this Court for issuance of the extraordinary writ.

As this Court has repeatedly and consistently held, mandamus is a truly extraordinary remedy to be invoked only where no other adequate remedy is available, e.g., *Allied Chemical Corp. v. Daiflon, Inc.*, — U. S. —, 101 S. Ct. 188, 190-91 (1980); *Heltoski v. Meanor*, 442 U. S. 500 (1979); *Kerr v. United States District Court*, 426 U. S. 394, 402-03 (1976); *Ex Parte Rowland*, 104 U. S. 604, 617 (1882), where the decision sought to be reviewed is in no way discretionary, *e.g., Allied Chemical Corp. v. Daiflon, Inc., supra*, 101 S. Ct. at 190-91; *Will v. Calvert Fire Ins. Corp.*, 437 U. S. 655, 666 (1978), and where the party seeking the writ has demonstrated a clear and indisputable right to its issuance, *e.g., Allied Chemical Corp. v. Daiflon, Inc., supra*, 101 S. Ct. at 191; *Kerr v. United States District Court, supra*, 426 U. S. at 403; *Bankers Life & Casualty Co. v. Holland*, 346 U. S. 379, 384 (1953).

As the Court reaffirmed in *Heltoski v. Meanor, supra*, 442 U. S. at 505:

> "Almost a hundred years ago, this court explained, 'The general principle which governs proceedings by *mandamus* is, that whatever can be done without the employment of that extraordinary writ, *may not be done with it.*' Ex Parte Rowland, 104 U. S. 604, 617 1861)." (Emphasis in original.)

Here the District Court's bifurcation decision, even if wrong, can be fully and adequately reviewed on appeal from the final judgment that will soon be entered. Mead has set forth no persuasive reason in its petition why such review will not be adequate.

Similarly, this Court has repeatedly endorsed the proposition that "as a general rule appellate review should be postponed . . . until after final judgment" and that interlocutory mandamus petitions should therefore be denied. E.g., *Will v. United States,* 389 U. S. 90, 96 (1967); *Allied Chemical Corp. v. Daiflon, Inc., supra,* 101 S. Ct. at 190; *Parr v. United States,* 351 U. S. 513, 520-21 (1956). Just this term the Court again emphasized the strong policy reasons underlying strict limitation of piecemeal interlocutory review, such as Mead seeks here. In *Firestone Tire & Rubber Co. v. Risjord,* — U. S. —, 101 S. Ct. 669, 673 (1981), the Court stated:

> "This rule, that a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits, serves a number of important purposes. It emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the District Judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with sensible policy of

> *'avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals* from the various rulings to which a litigation may give rise, from its initiation to entry of judgment.' [Citations omitted] The rule also serves the important purpose of promoting efficient judicial administration." (Emphasis added.)

In this case final judgment will soon be entered on the jury's verdict, and review of all issues should await that event.[24]

Moreover, since bifurcation lies within the sound discretion of the trial court,[25] mandamus is particularly inappropriate here. *Allied Chemical Corp. v. Diaflon, Inc., supra,* 101 S. Ct. at 191; *Will v. Calvert Ins. Corp., supra,* 437 U. S. at 666.

In a case virtually on all fours with this case, the Ninth Circuit has explicitly held that mandamus is not available to review an order bifurcating "liability" from "damages" issues in a complex class action case. *Arthur Young & Co. v. United States District Court,* 549 F. 2d 686 (9th Cir.) *cert. denied,* 434 U. S. 829 (1977).

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24. It should be noted that this is Mead's *fifth* interlocutory appeal from various pretrial and trial decisions of the District Court. See *In re Corrugated Container Antitrust Litigation,* 80 F. R. D. 244 (S. D. Tex. 1978), *mandamus denied sub nom. In re Alton Box Board Company,* No. 78-3684 (5th Cir. Dec. 29, 1978) (class certification); 611 F. 2d 86 (5th Cir. 1980) (appeal dismissed) (content of class notice); 614 F. 2d 958 (5th Cir. 1980) (appeal dismissed and mandamus denied) (recusal of district judge); No. 80-1093 (5th Cir. 1980) (stay denied, appeal pending) (access to grand jury transcripts).

25. *In re Master Key Antitrust Litigation,* 528 F. 2d 5, 14 (2d Cir. 1975); 5 Moore, Federal Practice § 42.03 (2d ed. 1980); 9 Wright & Miller, Federal Practice & Procedure, ¶ 2388 at 283 (1971 and 1980 Supp.).

The cases upon which Mead relies simply do not support its claim to extraordinary relief. Many of the cases arose on review of a final judgment and simply did not involve mandamus at all.[26] The few cases that did arise on mandamus are entirely distinguishable. For example, *Dairy Queen, Inc. v. Wood,* 369 U. S. 469 (1962), *Beacon Theatres, Inc. v. Westover,* 359 U. S. 500 (1959) and *In re Simons,* 247 U. S. 231 (1918), all involved total denial of a jury trial, not simply a bifurcation resulting in a trial of different issues to separate juries.[27] Similarly, in *LaBuy v. Howes Leather Co.,* 352 U. S. 249 (1957), the District Court had referred the entire trial of an antitrust case to a special master, whereas here only a single narrow issue involving complicated calculations has been referred to the master. Indeed, in the *LaBuy* case the Court expressly approved the very sort of reference adopted by the District Court here:

> "We agree that the detailed accounting required in order to determine the [antitrust] damages suffered by each plaintiff might be referred to a master after the court has determined the overall liability of defendants, provided that the use of the court's time is not warranted in receiving the proof and making the tabulations." *Id.,* at 259.[28]

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26. *Rogers v. Missouri Pacific R. R.,* 352 U. S. 500 (1959); *Jacob v. City of New York,* 315 U. S. 752 (1942); *Dimick v. Schiedt,* 293 U. S. 474 (1935); *Ward v. Cochran,* 150 U. S. 597 (1893); *Hodges v. Easton,* 106 U. S. 408 (1882); *Slocum v. New York Life Ins. Co.,* 228 U. S. 364 (1913); *Curtis v. Loether,* 415 U. S. 189 (1974).

27. *Colgrove v. Battin,* 413 U. S. 149 (1973), approved the use of a six member jury in civil cases.

28. The District Court's appointment of a special master was entirely conventional and appropriate. *See In re Peterson,* 253 U. S. 300, 307 (1920), which approved appointment of a master in

In re Winn, 213 U. S. 458 (1909) (involving removal) and *United States Alkalai Export Association v. United States*, 325 U. S. 196 (1945) (primary jurisdiction), while both mandamus cases, have nothing to do with the right to jury trial or any other issues involved in this litigation.

Because the decisions below were discretionary, both in the District Court and the Court of Appeals; because the decisions can be fully and adequately reviewed after final judgment; and because the issuance of mandamus at this point in the proceedings would result in impermissible piecemeal review, the decision of the Court of Appeals was correct and the petition should be denied.

B. The Petition Fails to State a Reason for Granting Certiorari.

Rule 17 of this Court provides:

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling or fully measuring the court's discretion, indicate the character of reasons which will be considered: . . .

"(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in con-

28. (Cont'd.)

a jury case and reception of his report as "prima facie evidence both of the evidentiary facts and of the conclusions of fact." See also the Manual for Complex Litigation, Pt. 1, § 3.20 (1977 ed.) which recommends appointment of a master in "involved accountings" and "assisting in the distribution of funds among members of the class."

> flict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. . . .
>
> "(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

Petitioner Mead has shown no conflict among the circuits, no conflict with the decisions of this Court, no important question of federal law that this Court has not previously decided, and certainly no unusual departure from the normal course of judicial proceedings.

To the contrary, the petition seeks to interrupt and disrupt the normal course of judicial proceedings to seek interlocutory and piecemeal review of questions that can be fully and completely reviewed after the entry of final judgment.

1. The Court of Appeal's Refusal to Grant Mandamus Does Not Conflict With the Seventh Amendment, With the Decisions of This Court Interpreting the Seventh Amendment, or With the Decisions of Other Courts of Appeals.

Mead does not claim that the District Court's bifurcation order was in itself inappropriate—its petition admits that Mead itself requested bifurcation before trial. Petition, p. 16 n. 22. Nor can Mead maintain that contested issues of fact are being determined by the judge rather than the jury: A jury has already tried all issues save one;

and if contested factual issues remain after the special master's report and disposition of the parties' motions for summary judgment, those issues will likewise be sent to a jury. Mead's only complaint is that after nearly four months of jury trial, Judge Singleton did not retain the *same* jury to decide any potentially contested factual issues that may or may not arise in calculating the dollar amount of judgment. For nearly half a century it has been the law that trial by separate juries of separable issues in a single case does not violate the right to a jury trial under the Seventh Amendment.[29]

In *Gasoline Products Co. v. Champlin Refining Co.*, 283 U. S. 494 (1931), the Court of Appeals for the First Circuit had reversed a jury verdict for the counterclaim plaintiff because of errors in the charge of the trial court regarding the measure of damages, and remanded for a new trial limited to the issue of damages. On *certiorari* in this Court, the counterclaim defendant demanded a new trial of the entire matter, arguing that a partial retrial that allowed the case to be determined by two different juries violated its rights under the Seventh Amendment. Although the English common law provided no procedure for trying only part of a case to a second jury on remand, this Court held that a party could be accorded its Seventh Amendment jury trial right by the submission of separable issues to separate juries:

> "Here, we hold that, where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact, that requirement does not

29. Significantly, Mead's request for bifurcation *did not* specify any request for retention of the same jury, as Mead now claims. See Defendants' Preliminary Pretrial Order, ¶ IV.4 (Pl. App. at A17). That detail finds no support in the record, and appeared for the first time in Mead's petition for mandamus in the Court of Appeals.

compel a new trial of that issue even though another and separable issue must be tried again."

The determination of *Gasoline Products* has become settled practice. While not a routine procedure, the submission of separable issues to separate juries is recognized, in appropriate cases, to be within the informed and constitutional discretion of the trial court. As Professors Wright and Miller articulate the rule:

> "It has been held, on sound ground, that the Seventh Amendment is not violated by the separate submission of the issues to a single jury. *Is there a violation of the constitutional provision if issues are separately submitted to separate juries? The answer rather clearly must be in the negative.* When a single jury has passed on all issues, but error has tainted its verdict on one of the issues, it is now quite settled that there may be a new trial before a second jury limited to that single issue, provided that the error requiring a new trial has not affected the determination of any other issue. In this instance the result is that different juries ultimately resolve the issues. An argument that two juries may be used if one jury has first decided all the issues—though its verdict as to one of them has passed out of the case—but that two juries may not be used in the first instance seems untenable. The great guaranty of the Seventh Amendment will hardly support such a gossamer distinction." 9C Wright & Miller, Federal Practice & Procedure, § 2391, pp. 302-03. (Emphasis added.) (Footnotes omitted.)

Mead would have this Court believe that the procedure adopted by the trial judge in this case is a novel extrapolation of *Gasoline Products,* initiated by "a few courts" "in the last five years". (Petition, pp. 16-17.) In

fact, Wright & Miller's reading of *Gasoline Products* has been uniformly adopted by courts passing on the subject for almost two decades.

In 1959, the Northern District of Illinois adopted a local rule providing for the bifurcation of damages from liability in civil trials. A year later in *O'Donnell v. Watson Brothers Transportation Co.*, 183 F. Supp. 577 (N. D. Ill. 1960), Judge Miner, relying on *Gasoline Products*, explicitly upheld this procedure against Seventh Amendment challenge, when circumstances required the use of separate juries for the separable aspects of the case. Likewise, in *Union Carbide and Carbon Corp. v. Nisely*, 300 F. 2d 561 (10th Cir. 1962), an antitrust case, the Tenth Circuit expressly approved a procedure similar to the one used in this case, where class claimants presented evidence of damages to a master, to be calculated according to a formula reached earlier by jury verdict. There was no violation of the right to a jury trial, the court concluded: "If in the process of identifying the members of the class and assessing the amount of their respective damages, unresolved questions of fact are disclosed, it is time enough to submit those questions to a jury duly empaneled for that purpose." *Id.* at 589. Subsequent years are peppered with reported cases ordering and upholding the use of separate juries for separable issues.[30]

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30. *See, e.g., In re Ampicillin Antitrust Litigation*, 1980-81 Trade Cas. ¶ 63,750 (D. D. C. 1981); *Martin v. Bell Helicopter Co.*, 85 F. R. D. 654, 659-60 (D. Colo. 1980); *Payton v. Abbott Labs*, 83 F. R. D. 382, 394 (D. Mass. 1979); *Franchi Construction Co. v. Combined Insurance Co. of America*, 580 F. 2d 1, 7 (1st Cir. 1978) (dictum); *In re Gap Stores Securities Litigation*, 79 F. R. D. 283, 305 n. 22 (N. D. Cal. 1978); *In re Plywood Antitrust Litigation*, 1979-1 Trade Cases, ¶ 62,459 (E. D. La. 1978), *appeal docketed*; *Arthur Young & Co. v. U. S. District Court*, 549 F. 2d 686, 693 (9th Cir.), *cert. denied*, 434 U. S. 829 (1977); *In re Folding Carton Antitrust Litigation*, 75 F. R. D. 727, 735-36 n. 10 (N. D. Ill. 1977)

Indeed just last week the Third Circuit approved the bifurcation of a securities class action in which the issues of liability and damages were tried to separate juries empanelled more than two years apart. *Sharp v. Coopers & Lybrand,* No. 80-2229 (3d Cir. April 28, 1981), Slip Op. pp. 5-6, 34.

In an effort to manufacture a conflict among the circuits sufficient to warrant the grant of *certiorari,* Mead cites two cases that declined, on interlocutory appeal, to address the question of the constitutionality of bifurcation orders,[31] one case that refused to pass on the issue because it was not before the court [32] and dictum from a district court decision opining that the issue may be "unclear".[33] Mead also cites *Alabama v. Blue Bird Body Co.,* 573 F. 2d 309, 318 (5th Cir. 1978), which held that the Seventh Amendment protects the "general right of a litigant to have only one jury pass *on a common issue of fact.*" [34] The

30. (Cont'd.)

(*dictum*: unitary jury preferable where possible, but two juries constitutionally permissible); *In re Master Key Antitrust Litigation,* 70 F. R. D. 23 (D. Conn.), *appeal dismissed,* 528 F. 2d 5 (2d Cir. 1975); *Eastern Fireproofing Co. v. U. S. Gypsum Co.,* 50 F. R. D. 140 (D. Mass. 1970) (jury trial on liability, followed by master's report on damages, and presentation of report to jury three years later); *Swofford v. B&W, Inc.,* 34 F. R. D. 15, 20 (S. D. Tex. 1963), *aff'd.* 336 F. 2d 406, 415 (5th Cir. 1964); *Driver v. Phillips,* 36 F. R. D. 261 (E. D. Pa. 1964); *Dickinson v. Burnham,* 197 F. 2d 973, 980-81 (2d Cir. 1952), *cert. denied,* 344 U. S. 875 (1952).

31. *In re Master Key Antitrust Litigation,* 528 F. 2d 5, 15 (2d Cir. 1975); *Link v. Mercedes Benz of North America, Inc.,* 550 F. 2d 860, 864-65 (3d Cir.) *cert. denied,* 431 U. S. 933 (1977).

32. *Hosie v. Chicago & North Western R. R.,* 282 F. 2d 639, 642 (7th Cir. 1960), *cert. denied,* 365 U. S. 814 (1961).

33. *Pruitt v. Allied Chemical Corp.,* 85 F. R. D. 100, 117 n. 8 (E. D. Va. 1980).

34. Similarly, the Ninth Circuit's holding in *United Air Lines v. Weiner,* 286 F. 2d 302 (9th Cir.) *cert. denied,* 366 U. S. 924

separability of the issues, of course, was the basis for the trial court's decision to bifurcate in this case. See discussion at pages 23-25, *infra*. Such precedent hardly presents a conflict worthy of this Court's resolution.

Nor is Mead successful in its attempt to conjure up inconsistent precedent from this Court. The principle of *Hodges v. Easton*, 106 U. S. 408 (1882), upon which Mead places such great weight, in no way conflicts with the prevailing interpretation of *Gasoline Products*. *Hodges* overturned a determination of the circuit court because—as the opinion notes in the passage cited by Mead (p. 15)—the result was to

> "have a case at law, which the jury were sworn to try, determined as to certain material facts, *by the court alone*. . . . The court could not consistently with the constitutional right of trial by jury submit a part of the facts to the jury and, *itself determine the remainder*." *Id.* at 411-12. (Emphasis added.)

Here, Mead has already had a jury trial on all but one issue. As to that issue, the trial court has explicited ruled that any genuinely contested issues will be determined by a second jury. There is thus not the slightest question of any material facts being determined "by the court alone", as in *Hodges v. Easton*. If no disputed issues exist, then no Seventh Amendment questions arise. As Justice Brandeis explained in *In re Peterson*, 253 U. S. 300, 310 (1920), "No one is entitled in a civil case to trial by jury

34. (Cont'd.)

(1961), is entirely consistent with the Ninth Circuit's later approval of bifurcation and trial to two juries in *Arthur Young & Co. v. United States District Court, supra*. *United Airlines* held that the issue of punitive damages was not sufficiently separable from the issue of liability to constitutionally allow bifurcation under *Gasoline Products*.

unless and except so far as there are issues of fact to be determined". *Accord, Parklane Hosiery Co., Inc. v. Shore,* 439 U. S. 322, 336 (1979).

It is true, of course, that the procedures of 18th Century England probably did not provide for bifurcation and trial to two juries. Nor did they offer such modern devices as directed verdicts,[35] summary judgment,[36] six person juries,[37] non-mutual collateral estoppel,[38] judgments n.o.v.,[39] or special masters,[40] though all of these are constitutionally permissible. Exact replication of eighteenth century English procedure is not the command of the Seventh Amendment. As the Court noted in *Colgrove v. Battin*:

> "by referring to the 'common law', the Framers of the Seventh Amendment were concerned with preserving the right of trial by jury in civil cases where it existed at common law, rather than the various incidents of trial by jury . . . '[N]ew devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice'." 413 U. S. 155-57.

The bifurcation procedure adopted here accords with this principle. Far from impermissibly usurping the role of the jury, the trial judge appropriately utilized an accepted procedural device to simplify the jury trial and to make it

35. *Galloway v. U. S.*, 319 U. S. 372 (1943).

36. *Fidelity & Deposit Co. v. United States,* 187 U. S. 315 (1902).

37. *Colgrove v. Battin,* 413 U. S. 149 (1973).

38. *Parklane Hosiery Co., Inc. v. Shore,* 439 U. S. 322 (1979).

39. *Neely v. Martin K. Ebby Construction Inc.,* 386 U. S. 317 (1967); *Baltimore Y. Caroline Line Inc. v. Redman,* 295 U. S. 654 (1935); *Montgomery Ward & Co. v. Duncan,* 311 U. S. 243 (1940).

40. *In re Peterson,* 253 U. S. 300 (1920).

more convenient and less complex, burdensome, and expensive for the court, the parties and the jurors.

2. The Bifurcation Adopted in This Case Does Not Deprive Mead of Its Right to Trial by Jury Under the Gasoline Products Standard.

Under *Gasoline Products*, and the cases following it, the constitutional propriety of trial to separate juries turns on the relationship between the issues tried to the separate juries. When issues are "interwoven", a second jury's determination of part of a case risks failing to give due consideration to the findings of the first jury, thereby infringing Seventh Amendment right. On the other hand, distinct and separable issues can be tried to separate juries in a single case because each jury's determination can proceed without impinging on the findings of the other.

Adopting the standard enunciated by this Court in *Gasoline Products Co., Inc. v. Champlin Refining Co.*, 283 U. S. 494, 500 (1931), the Courts of Appeals have held that issues of liability and damages may be bifurcated in antitrust cases, without running afoul of the Seventh Amendment, when the issues are "so distinct and separable" that trial on either issue alone could proceed without injustice. *Alabama v. Blue Bird Body Co.*, 573 F. 2d 309, 318 (5th Cir. 1978); *In re Master Key Antitrust Litigation*, 528 F. 2d 5, 14-15 (2d Cir. 1975); *Union Carbide & Carbon Corp. v. Nisley*, 300 F. 2d 561, 589 (10th Cir. 1962).[41] The issues bifurcated here plainly meet that standard. In fact they are so distinct and separate as not even to cast a shadow upon one another.

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41. The reason for the "distinct and separable" standard is to avoid inconsistent verdicts or disparate findings. *Alabama v. Blue Bird Body Co., supra*, 573 F. 2d at 318; *Terrell v. Household Goods Carriers Bureau*, 494 F. 2d 16, 21 (5th Cir. 1974).

It is important to bear in mind that the bifurcation adopted in this case is much narrower than the bifurcation of *all* "damage" issues ordinarily involved in the reported antitrust decisions such as *Blue Bird* and *Terrell v. Household Goods Carriers Bureau,* 494 F. 2d 16, 21 (5th Cir. 1974). Here the issues of class-wide impact and class-wide measure of damages were tried to the same jury that determined liability. All that remains to be determined is the dollar amount of sales to class members. That issue is not intertwined in the slightest with the issues already determined.[42]

A strong indication that the bifurcated issues in this case do not overlap is that the facts bearing on either set of issues have no bearing on the other set of issues. Thus, the dollar amount of sales to class members—the sole issue in the subsequent proceeding—is a fact to be derived from the accounting records of the conspirator manufacturers. It could have no conceivable bearing on whether a price-fixing conspiracy existed, or whether the conspiracy affected prices to all class members, or if so by how much—the issues determined by the jury in the initial trial.

Conversely, facts tending to prove (or disprove) the conspiracy, or classwide impact or damages, have nothing to do with the dollar amount of a particular manufacturer's sales. For example, the fact that some or even many accounts were not the subject of specific price fixing discussions has nothing to do with how many dollars worth of corrugated boxes Container Corporation of America sold

42. As the District Court found:

"The issue [calculation of dollar damages] does not overlap those submitted to the jury and is not so intertwined with them as to render this decision unjust. It is an arithmetical calculation of a jury-determined percentage of overcharge multiplied by the relevant sales by corrugated manufacturers to class members" (PTO No. 60, p. 3, Mead App. at 6a.).

to class members between 1973 and 1975. Similarly, the occasional appearance of price-cutting in the market does not bear on whether Weyerhaeuser's sales were X dollars or Y during the period. The sales figures are what they are, regardless of price-fixing discussions, price cutting, price or profit variation, and the like.

The concern that bifurcation might lead to inconsistent verdicts on liability and damages simply has no application to the narrow sort of bifurcation at issue here. That concern has arisen in cases involving bifurcation of *all* "damage" issues, where there could be the possibility that the first jury might find that there was injury to business or property while the second jury might on the same evidence of injury in the damage phase, find none. *See e.g., Alabama v. Blue Bird Body Co., supra,* 573 F. 2d at 318.

Here there is no possibility of such inconsistent verdicts. One jury has already heard *all* the evidence on injury to business or property.[43] No such evidence would be relevant to the task of any second jury, whose sole function will be to determine the dollar amount of conspirators' sales to class members.

The issues here bifurcated are thus so separate and distinct as to meet the fairness standard of the *Gasoline Products* case and the decisions of the Courts of Appeals.

C. Conclusion

For all of the foregoing reasons, the Court should deny the petition.

---

43. The jury has also heard *all* the evidence of the percentage amount by which the class has been overcharged.

Respectfully submitted,

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Dated: May 7, 1981

Appendix.

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M. D. L. No. 310

IN RE: CORRUGATED CONTAINER
ANTITRUST LTIGATION

THIS DOCUMENT RELATES TO:

ALL CLASS ACTIONS

SPECIAL VERDICT

WE, THE JURY, UNANIMOUSLY FIND AS FOLLOWS:

1. Was there a combination or conspiracy (as defined in the Instructions) involving two or more corrugated producers to fix, raise, maintain, or stabilize or to otherwise affect prices of corrugated materials by agreeing not to compete on the basis of price or agreeing to exchange price information, which agreement had the purpose of affecting, or did in fact affect, prices paid for containers and sheets sold throughout the United States.

Yes
(Yes or No)

(If your answer to Question 1 is No, your verdict is for defendant and you should answer no further questions.)

2. If your Answer to Question 1 is yes, was the Mead Corporation a member of the combination or conspiracy?

Yes
(Yes or No)

(If your answer to Question 2 is No, your verdict is for the defendant and you should answer no further questions.)

3. If your answer to Questions 1 and 2 is yes, were any of the following companies also members of the combination or conspiracy?

Alton Box Board Co. *Yes* (Yes or No)

Boise Cascase Corp. *Yes* (Yes or No)

The Chesapeake Corporation of Virginia *No* (Yes or No)

Consolidated Packaging Corporation *Yes* (Yes or No)

Container Corporation of America *Yes* (Yes or No)

The Continental Group, Inc. *Yes* (Yes or No)

Corco, Inc. *No* (Yes or No)

Crown Zellerbach Corporation *Yes* (Yes or No)

Diamond International Corporation *No* (Yes or No)

Dura-Containers, Inc. *No* (Yes or No)

Fibreboard Corporation	*No* (Yes or No)
Georgia-Pacific Corporation	*No* (Yes or No)
Green Bay Packaging, Inc.	*No* (Yes or No)
Hoerner Waldorf Corporation (Champion International Corporation)	*Yes* (Yes or No)
Inland Container Corporation	*Yes* (Yes or No)
International Paper Company	*Yes* (Yes or No)
Interstate Container Corporation	*Yes* (Yes or No)
Longview Fibre Company	*No* (Yes or No)
MacMillan Bloedel Companies	*Yes* (Yes or No)
Menasha Corporation	*No* (Yes or No)
Olinkraft, Inc.	*Yes* (Yes or No)
Owens-Illinois, Inc.	*Yes* (Yes or No)
Packaging Corporation of America	*Yes* (Yes or No)

Potlatch Corporation	*No* (Yes or No)
St. Joe Paper Company	*Yes* (Yes or No)
St. Regis Paper Company	*Yes* (Yes or No)
Southwest Forest Industries, Inc.	*Yes* (Yes or No)
Stone Container Corporation	*Yes* (Yes or No)
Union Camp Corporation	*No* (Yes or No)
U. S. Corrugated Fibrebox Company	*No* (Yes or No)
Western Kraft East, Inc.	*No* (Yes or No)
Weyerhaeuser Company	*Yes* (Yes or No)
Willamette Industries, Inc.	*No* (Yes or No)

4(a) If there was a combination or conspiracy, did it it begin before January 1, 1964 and continue at least until December 31, 1975?

Yes
(Yes or No)

If the answer above is No, specify during what period the combination or conspiracy existed.

_____
(Specify)

(b) Did Mead or any other participant company withdraw from the combination or conspiracy prior to December 31, 1975?

Yes
(Yes or No)

If so, indicate which company and on what date.

Defendant or Other Company	*Date*
Crown-Zellerbach	Jan. 1970

(Use a separate sheet if more room is necessary.)

5. If in your response to Question 3 you found that the combination or conspiracy began prior to March 7, 1973, answer the following:

(a) Did the participants conceal the combination or conspiracy through affirmative acts of concealment?

No
(Yes or No)

(b) Did sheet plant plaintiffs exercise reasonable diligence in regard to discovering the existence of the combination or conspiracy?

No
(Yes or No)

(c) Did plaintiffs other than sheet plant purchasers exercise reasonable diligence in regard to discovering the existence of the combination or conspiracy?

No
(Yes or No)

(d) If the sheet plant purchasers of corrugated containers and sheets had conducted a reasonable investigation after they had cause to investigate, could they have discovered the existence of the combination or conspiracy through the exercise of reasonable diligence.

Yes
(Yes or No)

(e) If the purchasers of corrugated containers and sheets other than sheet plants had conducted a reasonable investigation after they had cause to investigate, could they have discovered the existence of the combination or conspiracy through the exercise of reasonable diligence.

No
(Yes or No)

6(a). If your answer to Questions 1 and 2 is Yes, did the combination or conspiracy cause financial damage to the sheet plants in their purchases of corrugated containers and sheets throughout the United States?

Yes
(Yes or No)

(b) If your answer to Questions 1 and 2 is Yes, did the combination or conspiracy cause financial damage to purchasers other than sheet plants in their purchases of corrugated containers and sheets throughout the United States?

Yes
(Yes or No)

7(a). If your answer to Question 6(a) is Yes, state by what percentage of the purchase price sheet plants were damaged.

5%
(Fill in percentage figure)

(b) If your answer to Question 6(b) is Yes, state by what percentage purchasers other than sheet plants were damaged.

5%

(Fill in percentage figure)

/s/ Carolyn R. Keys

Foreperson

September 13, 1980

Date

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M. D. L. No. 310

IN RE: CORRUGATED CONTAINER
ANTITRUST LITIGATION

THIS ACTION RELATES TO:

ALL ACTIONS EXCEPT:

FRANKLIN CONTAINER CORP., ET AL.
(C. A. NO. H-78-671)

SPECIAL VERDICT

WE, THE JURY, UNANIMOUSLY FIND AS FOLLOWS:

1. Do you find by a preponderance of the evidence that there existed within the United States an understanding or concert of action between two or more corrugated producers to fix, tamper with, stabilize or maintain the prices of corrugated containers and sheets?

_____
(Yes or No)

(If your answer to number 1 is "Yes," then skip to number 4 and do not answer number 2 or 3)

2. (a) Do you find by a preponderance of the evidence that there existed within the United States an understanding or concert of action between two or more corrugated producers

to exchange present or past pricing information, relating to corrugated containers?

_____

(Yes or No)

(b) If your answer to number 2(a) was "Yes," do you find by a preponderance of the evidence that the understanding or concert of action was for the purpose of or had the effect of fixing, tampering with, stabilizing or maintaining the prices of corrugated containers and sheets within the United States?

_____

(Yes or No)

(If your answers to number 2(a) and (b) are "Yes," then skip to number 4 and do not answer number 3)

3. (a) Do you find by a preponderance of the evidence that there existed within the United States an understanding and concert of action among two or more corrugated producers to exchange past or present pricing data and other information relating to corrugated containers and sheets?

_____

(Yes or No)

(b) If your answer to number 3(a) was "Yes," do you find by a preponderance of the evidence that the understanding or concert of action unreasonably restrained interstate commerce in violation of Section One of the Sherman Act?

_____

(Yes or No)

4. If your answers to number 1 or number 2(a) and (b) or number 3(a) and (b) are "Yes," do you find by a preponderance of the evidence that any of the following defendants participated in that understanding or concert of action?

Alton Box Board Company _____
(Yes or No)

Crown Zellerbach Corporation _____
(Yes or No)

The Mead Corporation _____
(Yes or No)

Westvaco Corporation _____
(Yes or No)

5. If your answer to number 4 is "Yes" for one or more of the defendants, do you find by a preponderance of the evidence that any of the following companies also participated in that understanding or concert of action?

Boise Cascade Corporation _____
(Yes or No)

Champion International Corporation _____
(Yes or No)

The Chesapeake Corporation of Virginia _____
(Yes or No)

Consolidated Packaging Corporation _____
(Yes or No)

Container Corporation of America _____
(Yes or No)

The Continental Group, Inc. _____
(Yes or No)

Corco, Inc. _____
(Yes or No)

Diamond International Corporation _____
(Yes or No)

Dura-Containers, Inc. _____
(Yes or No)

Fibreboard Corporation _____
(Yes or No)

Georgia-Pacific Corporation _____
(Yes or No)

Green Bay Packaging, Inc. _____
(Yes or No)

Hoerner Waldorf Corporation _____
(Yes or No)

Inland Container Corporation _____
(Yes or No)

International Paper Company _____
(Yes or No)

Interstate Container Corporation _____
(Yes or No)

Longview Fibre Company _____
(Yes or No)

MacMillan Bloedel, Inc. _____
(Yes or No)

MacMillan Bloedel Containers, Inc. _____
(Yes or No)

MacMillan Bloedel Ltd. _____
(Yes or No)

MacMillan Bloedel Packaging, Ltd. _____
(Yes or No)

Menasha Corporation _____
(Yes or No)

Olinkraft, Inc. _____
(Yes or No)

Owens-Illinois, Inc. _____
(Yes or No)

Packaging Corporation of America _____
(Yes or No)

Potlatch Corporation _____
(Yes or No)

St. Joe Paper Company _____
(Yes or No)

St. Regis Paper Company _____
(Yes or No)

Southwest Forest Industries, Inc. _____
(Yes or No)

Stone Container Corporation _____
(Yes or No)

Union Camp Corporation _____
(Yes or No)

U. S. Corrugated Fibrebox Company _____
(Yes or No)

Western Kraft East, Inc. _____
(Yes or No)

Weyerhaeuser Company _____
(Yes or No)

Willamette Industries, Inc. _____
(Yes or No)

ALL OF THE ABOVE _____
(Yes or No)

6. If your answer to number 4 (for one or more defendants) is "Yes," do you find by a preponderance of the evidence that the understanding or concert of action existed prior to March 7, 1973?

_____
(Yes or No)

7. If your answer to number 4 (for one or more defendants) is "Yes," and if you found in number 6 that the understanding or concert of action existed prior to March 7, 1973:

(a) Do you find by a preponderance of the evidence that the defendants concealed their understanding or concert of action?

_____
(Yes or No)

(b) Do you find by a preponderance of the evidence that by the exercise of due diligence, the plaintiffs could have discovered the existence of the understanding or concert of action?

_____
(Yes or No)

8. If your answer to number 4 (for one or more defendants) is "Yes," do you find by a preponderance of the evidence that the understanding or concert of action

caused financial damage to the purchasers of corrugated containers and sheets in any of the following areas:

(a) Throughout the United States

_____

(Yes or No)

(If your answer to number 8(a) is "No," then answer the following)

(b) In certain areas of the United States

_____

(Yes or No)

(If your answer to number 8(b) is "Yes," then answer the following)

(c) Identify those areas:

_____

_____

_____

9. If your answer to number 4 (for one or more defendants) is "Yes," state by what percentage of the purchase price purchasers of corrugated containers and sheets were damaged in the geographic area defined in your answer to number 8(a) or (c).

_____

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M. D. L. 310
(All Class Cases)

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

EXCERPTS FROM DEFENDANTS' PRELIMINARY PRETRIAL ORDER *

I. *Appearance of Counsel*

A. Defendant Alton Box Board Company ("Alton") will be represented by:

Robert B. Maucker
Hoagland, Maucker, Bernard & Almeter
401 Alton Street
Alton, Illinois 62002

Keith E. Kaiser
Stanley E. Crawford, Jr.
Cox & Smith Incorporated
600 National Bank of Commerce Bldg.
San Antonio, Texas 76205
(512) 226-7000

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* This Preliminary Pretrial Order is subject to revision, amendment and supplementation.

B. Defendant Crown Zellerbach Corporation ("Crown Zellerbach") will be represented by:

William R. Norfolk
James E. Tyrrell, Jr.
Yvonne S. Quinn
Daniel D. Caldwell
Theodore O. Rogers, Jr.
Sullivan & Cromwell
125 Broad Street
New York, New York 10004
(212) 558-4000

C. Defendant The Mead Corporation ("Mead") will be represented by:

* * *

III. *Jurisdiction*

The Court has jurisdiction over the matters complained of under Sections 4 and 16 of the Clayton Act (15 U. S. C. §§ 15 and 26), and by reason of the allegations made by plaintiffs under Section 1 of the Sherman Act (15 U. S. C. § 1).

IV. *Motions*

Defendants expect to file the following motions related to the trial of this action: [1]

1. Defendants' Motion for Partial Summary Judgment on the Issue of Fraudulent Concealment.
2. Defendants' Motion *in limine* to exclude at trial all evidence derived from or relating to the record in

1. Defendants reserve the right to file additional pretrial actions.

the case, *United States v. Container Corporation of America* (*"Greensboro"*).

3. Defendants' Motion to Require Separately as to Each Defendant, the Findings Mandated by the Fifth Circuit in *James* as a Precondition to Admission Into Evidence Against Each Defendant of the Hearsay Statement of Alleged Co-Conspirators.

4. Defendants' Motion For Jury to Determine the Issues of Liability and Damages Separately.

5. Defendants' Motion For A Twelve Person Jury.

6. Alton's Motion *in Limine* Regarding Inadmissibility of Pleas of Nolo Contendere Entered By Defendants In Prior Criminal Litigation.

7. Defendants' Motion Regarding Designation Of, Objection to and Ruling On Videotape Deposi-

• • •

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M. D. L. No. 310

IN RE: CORRUGATED CONTAINER ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:
ALL CLASS ACTIONS

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR PROPOSED SPECIAL VERDICT FORM

Plaintiffs' proposed jury instructions and special verdict form conform precisely to the procedures outlined in this Court's class certification decision. Plaintiffs propose that the jury find the amount of damages sustained by the class in terms of a formula which would permit the amount of damages of each class member to be measured. In its class certification opinion the Court anticipated "that the trial on the merits may establish a formula for computing damages." This Court further held that calculation of the amount of damages suffered by each class member, a question individual to each class member, was "susceptible to several methods of treatment, among them references to a master or magistrate. . . ." *In re Corrugated Container Antitrust Litigation*, 80 F. R. D. 244, 253 (S. D. Tex. 1978).

In *In re Plywood Antitrust Litigation*, M. D. L. No. 159, 1979-1 Trade Cas. ¶ 62,459 (E. D. La. 1978), appeal docketed No. — (5th Cir. 1980) (special verdict form attached hereto as Exhibit "A"). Judge Pointer approved and submitted to the jury a special verdict form under Rule

49(a) Federal Rules of Civil Procedure, in which the jury was asked to determine two formulae under which the damage to the class members could be calculated:

"2. (a) Did the use of "West Coast freight" in the pricing of Southern pine plywood during the period from February 23, 1968 to December 31, 1973 cause financial damages to the purchasers of such plywood? _____
(Yes or No)

"(b) If 2(a) is answered 'yes', was that damage equal to the amount by which 'West Coast freight' exceeded the actual freight charge (or the pickup allowance)?" _____
(Yes or No)

• • •

"4. (a) Did the use of 'standard weights' in the pricing of Western fir plywood during the period from February 23, 1968 to December 31, 1973 cause financial damage to the purchasers of such plywood? _____
(Yes or No)

"(b) If 4(a) is answered 'yes', was that damage equal to the amount by which freight calculated on the basis of 'standard weight' exceeded the actual freight charge?" _____
(Yes or No)

In his subsequent opinion rejecting defendants' motion for a judgment notwithstanding the verdict, Judge Pointer explained that since the jury had already determined a damage formula, a second proceeding on damages would "involve relatively simple if numerous mathematical issues distinct and separate from the first trial." *Id.* at p. 76,699.

Judge Pointer explained:

> "While thousands of transactions may be involved, the provisions of FRE 1006 should simplify the presentation of evidence. It may well be that most, if not all, damage claims can be resolved by summary judgment after necessary discovery and data compilations have been completed." *Id.* at note 6.

Judge Pointer noted that the severance of the limited issue of amount of damages sustained by individual class members avoided the necessity of introduction of the details of each member's purchase in the initial proceeding and was the precise method of adjudication of an antitrust civil action sanctioned by the Fifth Circuit in such cases as *State of Alabama v. Bluebird Body Co.*, 573 F. 2d 309 (5th Cir. 1978); *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F. 2d 1307 (5th Cir. 1976) and *Terrell v. Household Goods Carriers Bureau*, 494 F. 2d 16 (5th Cir. 1974). In *Plywood*, violation, impact and a damage formula were established in the initial proceeding, as they would be in this action.

A similar special verdict form was submitted to a jury by Judge Bechtle in *Ralston Purina Co. v. American Bag & Paper Co.* (*"Consumer Bags Antitrust Litigation"*), Civil No. 77-3092 (filed May 20, 1980 E. D. Pa.) (attached hereto as Exhibit "B").

In that action, the jury was asked:

> "5. What percentage portion of the total amount that Ralston Purina paid to all the conspirators for the purchase of consumer bags during the following periods represented an overcharge proximately caused by the conspiracy?"

In *Union Carbide and Carbon Corp. v. Nisley*, 300 F. 2d 561 (10th Cir. 1961), *cert. dismissed*, 371 U. S. 801 (1962), the Tenth Circuit specifically affirmed a procedure under which initially a jury was asked to determine a measure of overcharge in an antitrust action; [1] a notice was subsequently mailed to class members, and the amount of actual damages to each class member was calculated by a special master. Judge Murrah explained:

> "Nor does submission to a special master violate defendants' right to a single, indivisible jury trial. All operative facts have been determined in the original action. The master serves only to assess the amount of individual damages, based upon the formulae stated in the verdict and appellants' own records. And see Rule 49(a) F. R. Civ. P." 300 F. 2d at 589.

Were a disputed factual issue to arise in the course of assessing the amount of individual damages, the Court held that a jury could be empaneled to adjudicate those questions:

> "If, in the process of identifying the members of the class and assessing the amount of their respective damages, unresolved questions of fact are disclosed, it is time enough to submit those questions to a jury, duly empaneled for that purpose. The interlocutory order of the court does not contemplate the denial of

1. The action was brought under Rule 23 prior to the 1966 amendments.

the right to a jury trial on any unlitigated question of liability." 300 F. 2d at 589.

The procedures suggested by Judge Pointer in *Plywood*, such as use of F. R. E. 1006, would facilitate a jury's task in resolving such issues.

Following both *Nisely* and the Fifth Circuit's decisions in *Swofford v. B & W, Inc.*, 336 F. 2d 406 (5th Cir. 1964) and *Terrell v. Household Goods Carriers Bureau*, 494 F. 2d 16 (5th Cir. 1974), both the Second Circuit in *In re Master Key Antitrust Litigation*, 528 F. 2d 5 (2d Cir. 1975) and the Ninth Circuit in *Arthur Young & Co., Inc. v. United States District Court*, 549 F. 2d 686 (9th Cir. 1977) recommended procedures identical to those adopted by this Court under which the issue of the actual amount of individual damages would be calculated in a separate proceeding following determination of liability and a formula for calculating damages at the initial proceedings. Both Circuits held that because calculation of damages was a distinct and separable issue, a separate proceeding on damages would not violate a defendant's right to a jury trial.

In *Arthur Young*, *supra*, the Ninth Circuit explained:

> "We again rely on *Blackie v. Barrack*, *supra*, to dismiss petitioners' contention that the reservation of some damage-related issues for resolution subsequent to the class trial was error. We reach this result not because the individual and reserved issues do not appear real as they concern damages suffered by the class members, but because these damage issues do not, as a rule, defeat class certification in cases such as these, and because separation of a trial on damage issues does not contravene the Seventh Amendment in this case.

"As stated in *Blackie*, 524 F. 2d at 905:

'The amount of damages is invariably an individual question and does not defeat class action treatment. E.g., *U. S. Financial Securities Litigation*, [64 F. R. D. 443 (S. D. Cal. 1974)] at 448 n. 5, and cases there cited. Moreover, in this situation we are confident that should the class prevail, the amount of price inflation during the period can be charted and the process of computing individual damages will be virtually a mechanical task. [citation omitted].'

"It appears to us that after class trial on the primary damage issues in this case as provided by the district court's order, all that will remain is to determine the amount invested and the interest bought by each claimant, then compute damages for each claimant. We find no substantial ground for distinction between *Blackie* and our cases on this issue." 549 F. 2d at 696.

See also the Court's discussion at 549 F. 2d 692-94.

In *Master Key, supra*, the Second Circuit held:

"If the appellees establish at the trial for liability that the defendants engaged in an unlawful national conspiracy which had the effect of stabilizing prices above competitive levels, and further establish that the appellees were consumers of that product, we would think that the jury could reasonably conclude that appellants' conduct caused injury to each appellee. See *In re Ampicillin Antitrust Litigation*, 55 F. R. D. 269, 275-76 (D. D. C. 1972); *Illinois v. Harper & Row Publishers, Inc.*, 301 F. Supp. 484 (N. D. Ill. 1969). The amount of such injury could then be computed at a separate trial for damages, and appropriate substratification of classes could be

utilized to facilitate that determination. See *Union Carbide & Carbon Corp. v. Nisley*, 300 F. 2d 561, 567 (10th Cir. 1961), *cert. dismissed*, 371 U. S. 801, 83 S. Ct. 13, 9 L. Ed. 2d 46 (1962); *Amaco Automatic Transmission, Inc. v. Taylce*, 67 F. R. D. 440 (D. D. Pa. 1975); *Sommers v. Abraham Lincoln Federal Savings & Loan Ass'n.*, 66 F. R. D. 581, 591-92 (E. D. Pa. 1975); *Barr v. WUI/TAS, Inc.*, 66 F. R. D. 109, 115 (S. D. N. Y. 1975); *Wainright v. Kraftco Corp.*, 54 F. R. D. 532, 534-35 (N. D. Ga. 1972)." 528 F. 2d at 12 n. 11.[2]

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2. The district judge in *Master Key* discussed and dismissed defendants' constitutional concerns in greater detail:

> "The defendants' other objection to splitting the liability trial from the damage determination is that this procedure will preclude the use of the same jury for both stages, in violation of the Seventh Amendment to the Constitution. *Cf. United Air Lines, Inc. v. Wiener*, 286 F. 2d 302 (9th Cir.) *cert. denied*, 366 U. S. 924, 81 S. Ct. 1352, 6 L. Ed. 2d 384 (1961). The constitutional question turns on whether 'the issue to be [tried to a second jury] is to distinct and separable from the others that a trial of it alone may be had without injustice." *Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U. S. 494, 500, 51 S. Ct. 513, 515, 75 L. Ed. 1188, 1191 (1931). Here the distinctness of the damage issue seems clear. At the liability stage, it will be determined whether the defendants' conduct included violations of the antitrust laws and whether it affected prices. The proof of the alleged conspiracy and of liability to the plaintiffs will be possible without detailed reference to damages, as set out in note 3, *supra*. Similarly, proof of damages suffered will be possible without detailed reference to liability issues: the issues at this stage will be what the plaintiffs paid for their master key systems and what they would have paid if the defendants had refrained from specific conduct earlier found to be illegal. Thus, I find the defendants' constitutional objections unpersuasive and order that separate trials be held on the issues of liability and

In *Swofford v. B & W, Inc.*, 336 F. 2d 406 (5th Cir. 1964), the Fifth Circuit upheld a ruling by Judge Noel of this Court that the issue of liability in a patent infringement action would be tried separately from the issue of damages. The Court found that such a procedure would not violate the defendant's right to a jury trial under the Seventh Amendment. In *Terrell v. Household Goods Carriers Bureau*, 494 F. 2d 16 (5th Cir. 1974), the Fifth Circuit remanded an antitrust action for a separate trial on damages after affirming a jury verdict on the issues of violation and causation.[3]

A recent example of the separate and distinct nature of liability and amount of damages in an antitrust action

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2. (Cont'd.)

damages. *Cf. Terrell v. Household Goods Carriers Bureau*, 494 F. 2d 16 (5th Cir. 1974); *Swofford v. B & W, Inc.*, 336 F. 2d 406, 415 (5th Cir. 1964), *cert. denied*, 379 U. S. 962, 85 S. Ct. 653, 13 L. Ed. 2d 557 (1965); *LoCicero v. Humble Oil & Refining Co.*, 52 F. R. D. 28 (E. D. La. 1971)." 70 F. R. D. 23 at 29. (D. Conn. 1976).

Accord, *Link v. Mercedes Benz of North America, Inc.*, 1975-2 Trade Cas. ¶ 60,534 (E. D. Pa. 1975), *appeal dismissed*, 550 F. 2d 860 (3rd Cir. 1976) ("it may be possible to utilize a special master to calculate damages of individual class members").

3. In *Parklane Hosiery v. Shore*, — U. S. — 99 S. Ct. 645 (1979), a private action brought to recover damages arising from a violation of the federal securities laws, the Supreme Court held that a partial summary judgment on the issue of violation which had been determined in a prior government civil action was proper, based upon collateral estoppel. The Court held that the fact defendant had no right to jury trial in the prior government action did not bar the entry of summary judgment in the subsequent private action in which a jury had been demanded. The Court noted that the private plaintiff would still be required to prove causation and damages.

is *Phillips v. Crown Central Petroleum Corp.*, 395 F. Supp. 735 (D. Md. 1975) (liability) 426 F. Supp. 1156 (D. Md. 1977) (damages), *aff'd in part and rev'd in part*, 602 F. 2d 616 (4th Cir. 1979) *cert. denied*, — U. S. —, 100 S. Ct. 1021 (1980) in which separate trials were held several years apart on the issues of liability and damages in a price fixing action. See also, *Goldfarb v. Virginia State Bar*, 421 U. S. 773, 776 (1975) ("trial solely on the issue of liability").

As in *Nisely* and *Plywood*, application of a percentage damage verdict returned by a jury in this action to the actual purchases by each class member to determine actual damages incurred involves issues separate and distinct from those determined by the jury in its verdict. As in *Plywood*, such a procedure avoids "that part of trial which would be concerned with details of individual purchases and purchasers. . . ." 1979-1 Trade Cases at page 76,699. Accord, *Nisely*, 300 F. 2d at 589. The only factual questions remaining to be adjudicated would be the amount of corrugated purchased by the claimants.

The majority of claims could be adjudicated either upon summary judgment, as Judge Pointer foresaw in *Plywood*, or, as was done in *Nisely*, by submission to a special master—or by a combination of procedures. Any outstanding factual issue remaining could then be submitted to a jury for determination. See, e.g., *Plywood*, 1979-1 Trade Cases at p. 76,699, note 6; *Nisely*, 300 F. 2d at 589; *Arthur Young v. United States District Court*, 549 F. 2d 686, 693 (9th Cir. 1977); *see also, Connecticut Importing Co. v. Frankford Distilleries*, 42 F. Supp. 225 (D. Conn. 1940) (submission of Master's report to jury).

To adjudicata the actual damages to each claimant prior to adjudication of liability and actual filing of claims would be a waste of resources, *see e.g., In re Antibiotic*

Antitrust Actions, 333 F. Supp. 278, 288 (S. D. N. Y. 1971) *mandamus denied sub nom, Pfizer v. Lord*, 447 F. 2d 122 (2d Cir. 1971), since all class members may not file claims and the most efficient source to begin determination of the actual purchases of class members would be from the claim forms they submit.

The procedures employed in both *Plywood* and *Nisely*, under which the final judgment was held open to permit filing and adjudication of actual claims of class members, have frequently been applied in those class action cases which ave proceeded to trial. *See e.g., Gerstle v. Gamble-Skogmo, Inc.*, 298 F. Supp. 66, 104 (S. D. N. Y. 1969), 332 F. Supp. 644 (1971) 348 F. Supp. 979 (1972) *modified and aff'd*, 478 F. 2d 1281 (2d Cir. 1973); *Gould v. American Hawaiian Steamship Co.*, Civil Action No. 3707 (D. Del. Memorandum Opinion, June 28, 1974) *vacated on other grounds*, 535 F. 2d 761 (3d Cir. 1976) (attached hereto as Exhibit "C"); *Brennan v. Midwestern United Life Insurance Company*, 286 F. Supp. 702, 729 (N. D. Ind. 1968), *aff'd*, 417 F. 2d 147 (7th Cir. 1969) *cert. denied*, 397 U. S. 989 (1970); *Dickinson v. Burnham*, 197 F. 2d 973, 980-981 (2d Cir. 1952) *cert. denied*, 344 U. S. 875 (1952).

In each of the above cases, a formula of damages was established at trial and final damages to each class member determined by application of the formula to the actual claims filed.

CONCLUSION

For the reasons stated above, plaintiffs respectfully request that their instruction on damages and special verdict form be adopted.

Respectfully submitted,

MANDELL & WRIGHT
Stephen D. Susman
Chairman, Plaintiffs'
Steering Committee
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Howard Langer
1622 Locust Street
Philadelphia, Pennsylvania 19103

By STEPHEN D. SUSMAN
Stephen D. Susman
On Behalf of All Plaintiffs

Dated:

September 5, 1980

CERTIFICATE OF SERVICE

This is to certify that on the 5th day of September, 1980, a true and correct copy of the foregoing was served on the following counsel:

Harold F. Baker, Esq.	(by messenger)
John D. Roady, Esq.	(by messenger)
William E. Wright, Esq.	(by regular mail)
Jerold F. Salzman, Esq.	(by regular mail)

By STEPHEN D. SUSMAN
Stephen D. Susman

Exhibit "A"

IN RE PLYWOOD ANTITRUST LITIGATION

M. D. L. Docket No. 159
(All Cases)

SPECIAL VERDICT

WE, THE JURY, UNANIMOUSLY FIND AS FOLLOWS:

1. (a) Was the use of "West Coast freight" in the pricing of Southern pine plywood during the period from February 23, 1968, to December 31, 1973, the result of a conspiracy between two or more manufacturers of softwood plywood? *Yes* (Yes or No)

(b) If 1(a) is answered "yes", which plywood manufacturers were parties to that conspiracy?

—Georgia Pacific Corporation? *Yes* (Yes or No)

—Weyerhaeuser Company? *Yes* (Yes or No)

—Williamette Industries, Inc.? *Yes* (Yes or No)

—all other manufacturers of softwood plywood? *No*

(Yes or No)

—some other manufacturer(s) of softwood plywood? If answered "yes", which other manufacturer(s)? *Yes*

(Yes or No)

Southern Pine Plywood Manufacturers

2. (a) Did the use of "West Coast freight" in the pricing of Southern pine plywood during the period from February 23, 1968, to December 31, 1973, cause financial damage to the purchasers of such plywood? *Yes*

(Yes or No)

(b) If 2(a) is answered "yes", was that damage equal to the amount by which "West Coast freight" exceeded the actual freight charge (or the pick-up allowance)? *Yes*

(Yes or No)

3. (a) Was the use of "standard weights" in the pricing of Western fir plywood during the period from February 23, 1968, to December 31, 1973, the result of a conspiracy between two or more manufacturers of softwood plywood? *Yes*

(Yes or No)

(b) If 3(a) is answered "yes", which plywood manufacturers were parties to that conspiracy?

—Georgia Pacific Corporation? *Yes*

(Yes or No)

—Weyerhaeuser Company? *Yes*

(Yes or No)

—Willamette Industries, Inc.? *Yes*

(Yes or No)

—all other manufacturers of softwood plywood? *Yes*

(Yes or No)

—some other manufacturer(s) of softwood plywood? If answered "yes", which other manufacturer(s)? *No*

(Yes or No)

4. (a) Did the use of "standard weights" in the pricing of Western fir plywood during the period from February 23, 1968, to December 31, 1973, cause financial damage to the purchasers of such plywood? *Yes*

(Yes or No)

(b) If 4(a) is answered "yes", was that damage equal to the amount by which freight calculated on the basis of "standard weight" exceeded the actual freight charge? *Yes*

(Yes or No)

DALE A. GRIDEZ
Foreman

Exhibit "B"

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 77-3091

RALSTON PURINA COMPANY

v.

AMERICAN BAG & PAPER COMPANY
INTERROGATORIES TO THE JURY

1. Did there exist between 1950 and 1976 a conspiracy to fix the prices at which consumer bags were to be sold to plaintiff Ralston Purina? YES___ NO X

(If "Yes," answer question #2. If "No," answer no more questions.)

2. Was American Bag and Paper Company a member of the conspiracy? YES___ NO___

(If "Yes," answer question #3. If "No," answer no more questions.)

3. Did American Bag and Paper Company ever withdraw from the conspiracy?

(If "Yes," fill in the date withdrawal took place:

_____
(date)

(If your answer is either "Yes" or "No", answer question #4.)

4. Was the existence and operation of the conspiracy fraudulently concealed from plaintiff Ralston Purina?

YES___ NO___

(If "Yes", fill in the date the fraudulent concealment ended, if it did: _____)

(If your answer is either "Yes" or "No," answer question #5.)

5. What percentage portion of the total amount that Ralston Purina paid to all the conspirators for the purchase of consumer bags during the following periods represented an overcharge proximately caused by the conspiracy?

1950 to October 29, 1972: _____%

October 29, 1972 to November 1, 1976: _____%

_____

/s/ FOREMAN OF THE JURY

Exhibit "C"

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 3707/3722
CONSOLIDATED

MARVYN GOULD, Executor of the Estate of J. Donald Rogasner, and J. DAVID PINCUS, on behalf of themselves and all others similarly situated,

Plaintiffs,

MARY S. McCORD and CHARLES T. McCORD, JR.,

Intervening Plaintiffs,

v.

AMERICAN HAWAIIAN STEAMSHIP COMPANY, et al.,

Defendants.

MEMORANDUM OPINION

Wilmington, Delaware

June 28, 1974

William Prickett and Rodman Ward, Jr., of Prickett, Ward, Burt & Sanders, Wilmington, Del.; Harold E. Kohn, Aaron M. Fine and Stephen E. Heberfield, of Harold E. Kohn, P. A., Philadelphia, Pa., for plaintiff Gould and all those similarly situated and for intervening plaintiffs.

Samuel F. Keil, of Keil and Keil, Wilmington, Del., for plaintiff Pincus.

WRIGHT, *Senior Judge.*

In an opinion filed on August 17, 1973, 362 F. Supp. 771, this Court held defendants Litton Industries, Inc., Monroe International Corporation Retirement Plan Trust and Joseph T. Casey, collectively known as the Litton defendants, liable to the plaintiff class for violation of § 14 (a) of the Securities Exchange Act of 1934, 15 U. S. C. § 78n(a). On October 23, 1973, the Court entered an order conforming with that opinion. Paragraph 4 of that Order provides:

> "Judgment shall be entered against said defendants in favor of the plaintiff class in an amount to be determined as follows: $8.25 (the amount of the premium per share determined to have been received by Litton and Monroe) multiplied by the number of shares in the class, and by the 1,050,000 shares owned by Litton and Monroe, and divided by 10,032,000 (the number of shares of McLean Common Stock issued and outstanding immediately prior to the merger)."

Plaintiffs have now moved to enter judgment. Defendants oppose that motion on four distinct grounds.

APPRAISAL SHARES

The Litton defendants contend that the "appraisal shares", those belonging to McLean shareholders who demanded appraisal at the time of the Reynolds-McLean merger and received $45 per share, should not be included in the number of shares in the plaintiff class. It is agreed that among the 2,983,813 shares of McLean Industries common stock owned on the relevant date, May 13, 1969, by McLean shareholders (other than the defendants) who have not opted out of this action, are 185,123 appraisal

shares. If the appraisal shares are included in the relief formula, the judgment against the Litton defendants would be $2,431,083.53; if not, the judgment would be $2,280,253.21.

The Litton defendants concede that it was proper to include the appraisal shares in the class holdings at the time of trial since the defendants were potentially liable to the appraisal shareholders under certain of the alternative theories advanced by the plaintiff class. The Litton defendants argue, however, that under the "premium" theory of recovery adopted by the Court, the appraisal shareholders suffered no monetary damages for which they have not already been compensated. This Court held that the Litton defendants "are liable for damages equivalent to the plaintiff class's proportionate share of the $8.25 premium per share received by these defendants, . . ." 362 F. Supp. at 778. The Litton defendants reason that if the "premium" theory of recovery were applied both to them and to the defendants who previously settled in this action, McLean shareholders were entitled to a total value per share of $43.54.[1] Since the appraisal shareholders have already received $45 per share, they have recovered, according to the Litton defendants, more than their actual damages and are entitled to no further compensation.

1. The Litton defendants compute this figure as follows: (a) the total premium received by the Litton defendants was $8,662,500 ($8.25 x 1,050,000 shares) or approximately 81.5 cents per McLean share outstanding; (b) if the Ludwig group of defendants had not settled and if the same "premium" theory of damages had been applied to them, the premium received by the Ludwig group was $10,345,500 ($8.25 x 1,254,000 shares) or approximately 97.5 cents per share; (c) therefore, the McLean shareholders were entitled to receive the value of their McLean stock, $41.75 per share, plus $1.79 per share, representing their proportionate share of the premium received by the Litton and Ludwig interests, for a total value of $43.54 per share.

See, 15 U. S. C. § 78bb(a); Mills v. Electric Auto-Lite, 396 U. S. 375, 388-389 (1969); Kohler v. Kohler Co., 208 F. Supp. 808, 825 (E. D. Wis. 1962) aff'd, 319 F. 2d 634 (7th Cir. 1963).

This Court has held that "under considerations of equity, the plaintiffs are entitled to participate in any premium obtained by the favored defendants." 362 F. Supp. at 778. The appraisal shareholders, like all other members of the plaintiff class, were deprived of the opportunity of making an informed evaluation of the premium received by the favored defendants as a result of the merger. Nothing in the record indicates that the appraisal shareholders have, through the appraisal mechanism, participated in the premium obtained by the Litton defendants. There is no intuitive or demonstrated reason why the shareholders who demanded appraisal and eventually received $45 per share from Reynolds, the surviving corporation, should be treated differently from other members of the plaintiff class who may have sold their stock after merger for more than $43.54 per share. See, Voege v. American Sumatra Tobacco Corporation, 241 F. Supp. 369, 375 (D. Del. 1965). Therefore, the appraisal shareholders will not be excluded from the plaintiff class.

By casting an equitable remedy requiring them to disgorge the appropriate share of the premium they received in the merger as a monetary limitation on the "actual damages" of any McLean shareholder, the Litton defendants have misconceived the nature of the relief afforded by the Court. This Court did not attempt to fix the "actual" or "out-of-pocket" damages but rather pointed out, "Once a merger has been consummated by means of a materially defective proxy statement, it is impossible to conclusively determine the consequences of the defect or the effect of its deletion or correction." 362 F. Supp. at 777. As between the Litton defendants, who were responsible for

and profited from the defective proxy statement, and the appraisal shareholders, the latter have a superior claim to the proportionate share of the Litton defendants' premium.

Credit for the Previous Settlement

The Litton defendants next assert the "fundamental principle" that absent any punitive damages a plaintiff may only recover in the legal processes the amount of his injury, whether that recovery comes by settlement, by judgment, or otherwise. They argue that if the same premium theory of recovery were applied to both the settling and nonsettling defendants, the total claim for damages of the plaintiff class would be $5,333,644.[2] Since the plaintiff class has already obtained a settlement of $4,000,000 from some of the defendants, the class can now recover no more than $1,333,644 from the Litton defendants, according to this argument.

Even assuming, for purposes of argument, that it would be unjust for plaintiffs to recover more than a proportionate share of the premium obtained by all the defendants, it may also be unjust to allow the Litton defendants to benefit by virtue of this principle. In other words, simply because the plaintiff class may have obtained under the terms of the settlement more than the settling defendants' proportionate share of the merger premium does not require that the Litton defendants should disgorge less than a proportionate share of the premium they obtained. Compare, Theobald v. Angeles, 208 A. 2d 129, 135 (N. J.

2. This amount is calculated as follows: the total premium obtained by all defendants ($8.25 per share x 2,304,000 shares = $19,008,000) multiplied by the percentage of McLean shares, including appraisal shares. In the plaintiff class (28%) yields $5,333,644. The Court at this time makes no judgment as to whether it is proper to apply retrospectively the same premium theory of recovery to the settling defendants as has been applied to the Litton defendants.

1965). If this Court is to limit the plaintiffs' recovery to a proportionate share of the premium, it might, for example, subtract the settling defendants' "overpayment" from the plaintiffs' recovery from the Litton defendants, but allow the settling defendants to obtain contribution from the Litton defendants for the amount of the set-off.

In any event, the question of a credit for the "overpayment" by the settling defendants is integrally related to the question of contribution. See generally, Note, Settlement in Joint Tort Cases, 18 Stan. L. Rev. 486 (1966), Note, Consequences of Proceeding Separately Against Concurrent Tortfeasors, 68 Harv. L. Rev. 697 (1955). This Court does not propose to evaluate the act-off sought by the Litton defendants from the standpoint of fairness among the parties and from the standpoint of the policy favoring settlement without also considering whether contribution is available to any of the defendants. Therefore, the Court will await completion of the briefing and argument of the issue of contribution before deciding whether the set-off is proper.

Stipulation on Damages

The Litton defendants' third contention is that the stipulation on damages agreed upon by the parties and incorporated into an order of the Court on May 10, 1973, (Defendants' Exhibit 4) forecloses any award of damages on the theory adopted by this Court. Paragraph 2 of the stipulation states:

> The plaintiff class does not and will not contend except as covered by paragraphs 6 or 7 herein that a more favorable exchange ratio would have been available to the McLean shareholders relating to the Reynolds-McLean merger if the McLean proxy material had not been deficient as determined by this Court. . . .

Read together, paragraphs 6 and 7 contain the assertion by the plaintiffs that because "defendants breached fiduciary duties under federal fiduciary law or common law to the class" they are obligated "to share the premium which they received, if any, over what the plaintiff class received, pro-rata with the class." The Litton defendants maintain that the relief granted by the Court falls outside the ambit of paragraphs 6 and 7 and therefore is unavailable to the plaintiff class.

This contention must be rejected for the reason that the violations of § 14(a) by the Litton defendants *were* breaches of federal fiduciary obligations. As this Court has stated, "Although it is clear that the 1934 Act creates fiduciary relationships and obligations of corporate directors and establishes a separate and distinct substantive federal law, the Act does so only in the areas it purports to regulate (citations omitted)," 362 F. Supp. 775. The obligations under § 14(a) as to the accuracy and completeness of proxy materials are fiduciary obligations. It is plain, therefore, that this Court found liability and granted relief consistent with paragraphs 6 and 7 of the stipulation on damages.

ENTRY OF JUDGMENT

The parties have taken opposing positions on the timing of the entry of judgment. Because entry of judgment must await disposition of the issues of set-off and contribution, this Court will not enter judgment at this time.

It is so ordered.

/s/ CALEB E. WRIGHT
Judge

Dated: June 28, 1974

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M. D. L. No. 310

IN RE:
CORRUGATED CONTAINER
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:
ALL CLASS ACTIONS

PLAINTIFFS' MOTION FOR PROCEEDINGS PREPARATORY TO ENTRY OF JUDGMENT

Plaintiffs now move this Court for an order for proceedings preparatory to entry of judgment. This order should provide as follows:

(1) The Court should appoint a master pursuant to Fed. R. Civ. P. 53(b), upon a finding that the matters to be referred to master are complicated.

(2) Within sixty days of the entry of the order appointing the master, the master should report on the following matters:

(a) the dollar value of corrugated containers and sheets sold by The Mead Corporation and its co-conspirators (as found by the jury) to class members who have elected to remain in the class, for the

period March 7, 1973, through December 31, 1975; and

(b) the dollar amount of the settlement funds in the class cases that reasonably can be attributed as being given by co-conspirators (as found by the jury) in consideration for release and dismissal of claims of class members against those co-conspirators for the period March 7, 1973, through December 31, 1975.

(3) The master's report should set forth the issues not subject to a bona fide dispute and the issues subject to a bona fide dispute, and for each issue subject to a bona fide dispute the master should render an opinion.

(4) All parties should have access to a prior draft of the master's report, and an opportunity to provide written comments to the master.

(5) The master is authorized to employ any consultants or staff that he believes is necessary for him to perform his prescribed tasks.

(6) All motions for summary judgment on the issue of the dollar amount of damages should be submitted within fifteen days of the master's report.

(7) All responses to any motions for summary judgment should be submitted within fifteen days of the above deadline for filing motions for summary judgment.

(8) Oral argument on any such motions for summary judgment should be had, at the convenience of the Court, within ten days from the filing of all responses to those motions.

(9) After the Court decides all motions for summary judgment, the Court should set for trial immediately all issues of disputed fact, if any, on which the Court does not grant summary judgment.

The grounds for this motion are set forth in the accompanying Memorandum.

Respectfully submitted,

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IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M. D. L. No. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

ALL CLASS ACTIONS

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PROCEEDINGS PREPARATORY TO ENTRY OF JUDGMENT

This Court should authorize proceedings leading to entry of a final judgment based upon damages to all class members (except opt-outs) as those damages were measured by the jury. Under the jury verdict, class members are entitled to trebled damages equal to 15% of the dollar value of their purchases of corrugated containers and sheets from the companies found to be co-conspirators by the jury from March 7, 1973 through December 31, 1975. The precise language of Fed. R. Civ. P. 23 and the circumstances of this case require the entry of a judgment expressed as a dollar figure representing the aggregate damages incurred by class members during the limitations period.

Settlement funds offset only a fraction of these damages. The judgment would be reduced, after actual damages are ascertained and trebled, by an amount equal

to that portion of the settlement funds given in consideration for release of claims of class members against co-conspirators for the overcharges during the damage period.

Plaintiffs have now proposed to this Court a procedure for reducing the percentage verdict into a final judgment expressed as a dollar figure. Because the ascertainment of the dollar volume of sales of corrugated containers and sheets by Mead and its co-conspirators may involve complicated accounting issues, this task is ideally suited for referral to a master under Fed. R. Civ. P. 53. The best records of sales by the co-conspirators to class members are in the custody of co-conspirators themselves. These records should provide a basis for summary judgment on all or many of the factual questions necessary to reduce the verdict to final judgment. Masters have often been used in the past to assist both courts and juries in deciding whether there are genuine disputed issues in matters involving accounting or arithmetic calculations.

After identifying disputed issues, if any, a master could render an opinion on these issues. Masters are often used to report on complicated jury issues. Genuinely disputed issues of fact concerning sales of co-conspirators may be submitted to a jury. At a jury trial the findings of the master should be given *prima facie* weight.

I.

This Court Should Enter a Judgment Based on the Damages to All Class Members as Found by the Jury

Fed. R. Civ. P. 23(c)(3) provides that:

> The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, *shall include* and specify or describe to whom the notice provided in subsection

> (c)(2) was directed and who have not requested exclusion, and whom the court finds to be members of the class.

In short, as the phrase "shall include" emphasized above indicates, a judgment in a class action should include the damages of all class members whom the court determined had been duly notified.* The entry of aggregate judgments in favor of the prevailing class or subclass has been routine among class actions that have gone to trial. *Boeing Co. v. Van Gemert*, — U. S. —, 100 S. Ct. 745 (1980) (aggregate judgment in securities class action); *Gerstle v. Gamble-Skogmo, Inc.*, 478 F. 2d 1281 (2d Cir. 1973) (aggregate judgment modified and affirmed in securities class action); *Gould v. American Hawaiian Steamship Company*, 362 F. Supp. 771, 778 (D. Del. 1973), and 387 F. Supp. 163, 172 (D. Del. 1974) (aggregate judgment to securities class), *reversed in part on other grounds*, 535 F. 2d 761 (3d Cir. 1976); *Harmsen v. Smith*, Civ. Action No. 73-460E, 74-345E (N. D. Cal. Jan. 2, 1980), *appeal docketed* (aggregate judgment in securities class action); *Senter v. General Motors Corporation*, 383 F. 2d 222, 229 (S. D. Ohio 1974), *aff'd* 532 F. 2d 511 (6th Cir.), *cert. denied*, 429 U. S. 870 (1976) (aggregate funds created for employment discrimination sub-classes); *Metro Homes v. City of Warren*, 19 Mich. App. 664 (1969), *leave to appeal denied*, 383 Mich. 761, *cert. denied*, 398 U. S. 959 (1970). *Cf. Bebchick v. Public Utilities Commission*, 318 F. 2d 187 (D. C. Cir.) (*en banc*), *cert. denied*, 373 U. S. 913 (1963);

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* This Court has found that all class members were reasonably notified under Rule 23(c)(2) by notice by mail and notice by publication. *See* Pretrial Order No. 30, ¶ 6; Affidavit of William Howard White Re Procedures Used for Individual Notice and Notice by Publication to Class Members, with exhibits (filed November 1, 1979).

Hodgson v. Wheaton Glass Co., 446 F. 2d 527 (3d Cir. 1971).**

The jury found that a conspiracy caused financial damage to the plaintiff class in their direct purchases of corrugated containers and sheets from defendant The Mead Corporation and 19 co-conspirators throughout the United States in the amount of 5% of the purchase prices paid by the plaintiff class for corrugated containers and sheets. Under this Court's interpretation of the law of fraudulent concealment, plaintiffs understand that the Court will limit recovery of damages to purchases by class members from March 7, 1973, through December 31, 1975.* For judgment, actual damages will be trebled, amounting to 15% of the total dollars paid by the plaintiff class for corrugated containers and sheets during that period.**

From treble damages and attorneys fees the Court should deduct a dollar amount equal to that portion of the

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** Because the judgment in this case should include the damages of all class members, and this amount might exceed the amount eventually distributed to claimants, at some point a question might arise concerning the disposition of any residual funds. For the purposes of this note, it should suffice to say that there is a federal statute that will deposit the residue in the United States Treasury, followed by potential state escheat in the absence of any other disposition. 28 U. S. C. § 2042. *See Hodgson v. Wheaton Glass Co.*, 446 F. 2d 527, 535 (3d Cir. 1971); *United States v. Klein*, 106 F. 2d 213 (3d Cir.), *cert. denied*, 308 U. S. 618, 1939.

* Plaintiffs believe that they sufficiently proved fraudulent concealment and that the jury's findings should allow recovery of damages incurred from January 1, 1964 through December 31, 1975.

** The plaintiff class is also entitled to recover from defendant The Mead Corporation its cost of suit including a reasonable attorneys fee.

settlement funds given in consideration for release of claims by class members against co-conspirators for overcharges during the damage period. Settlements received from companies which were not found to be co-conspirators during the limitations period would not be deducted because Mead is not being held responsible in the judgment from purchases from those companies. The settlements from co-conspirators cover a time period longer than the period of recovery by judgment, so that they would be deducted from the judgment in a proportion reflecting the relationship between the period covered by the judgment and the period for which the release of liability was obtained in the settlement. Numerous cases support this approach.*

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* Any reduction to be made to account for any portion of the damages awarded by the jury previously received through settlement with a co-conspirator is to be made following trebling of the total damages. *Flintkote Co. v. Lysfjord*, 246 F. 2d 368, 397-98 (9th Cir.), *cert. denied*, 355 U. S. 835 (1957); *Baughman v. Cooper-Jarrett, Inc.*, 430 F. 2d 529 (3d Cir. 1976). *See also Zenith Radio Corp. v. Hazeltine Research, Inc., id.; Carpa, Inc. v. Ward Foods, Inc.*, 536 F. 2d 39, 55 (5th Cir. 1976). "The burden is on the one claiming duplication to show that the damages assessed against him have in fact and in actuality been previously covered in a prior settlement or judgment." *Cates v. United States*, 451 F. 2d 411 n. 21 (5th Cir. 1971) (Brown, C. J. citing *Zenith*). In *Baughman v. Cooper-Jarrett, Inc.*, 391 F. Supp. 671, 678 (W. D. Pa. 1975), the district court reduced the ultimate judgment by that proportion of the settlements with co-conspirators that represented damages for the period for which the jury awarded damages against the sole defendant to proceed to trial. The court refused to deduct that portion of the settlement which represented damages recovered by means of settlement for the period not covered by the damage verdict. The Third Circuit specifically affirmed the pro-rata procedure. *Baughman v. Cooper-Jarrett, Inc.*, 530 F. 2d 429, 533-35 (3d Cir. 1976).

II.

This Court Should Refer This Matter to a Master Who Would Be Well-Suited to Report on These Complicated Issues

Fed. R. Civ. P. 53 describes in detail the use of a master. Complicated issues can be referred to a master in jury cases. Fed. R. Civ. P. 53(b). The instant issue is precisely the kind appropriate for reference to a master, because its resolution entails accounting and arithmetic functions rather than an evaluation of demeanor and the credibility of witnesses. Specifically, the master should determine the dollar value of the corrugated containers and sheets sold by class members (who did not opt-out) by Mead and the 19 co-conspirators during the limitations period. Many co-conspirators may have aggregated their sales of corrugated containers and sheets on some periodic basis; for other co-conspirators calculations might have to be made for invoices. Whenever aggregate sales figures are used, the master must insure that foreign sales, and sales to nonclass members such as opt-outs, defendants, and independent corrugators, are excluded. Finally, the master should determine the relationship between the total dollar volume of sales for the limitations period and for the 1960 through 1978 period covered by the settlement agreements. This last calculation is necessary in order to ascertain the precise amounts of the settlements of the co-conspirators that need to be deducted from the treble damage award to prevent duplicative recovery. All of these tasks do not involve complicated legal issues or issues concerning the credibility of witnesses. They do require complicated accountings. As the *Manual for Complex Litigation*, ¶ 320 (1977 ed.), states:

> When the complex case presents problems which justify appointing a master, a master may perform

> useful functions on matters to be specified in the order such as . . . involved accountings [and] assisting in the distribution of funds among members of the class and other administrative tasks.

The leading case regarding the propriety of referral in jury cases is *In re Peterson,* 253 U. S. 300 (1920). That moderately complex, contract action in the trial court involved "123 deliveries of cargoes . . . made on 91 different days during a period of nine months." Judge Augustus Hand referred all issues, including the issues of damages, to a master (an auditor) who was to segregate those items not contested and those actually in controversy and render an opinion ultimately on the net amount due. The Supreme Court in an opinion by Justice Brandeis upheld the authority of the district court to refer such issues to a master, reasoning that:

> The District Court found that, in order to render possible an intelligent consideration of the case by court and jury, it was necessary to appoint an auditor and confer upon him two functions. The first was to segregate those items upon which the parties agreed and to classify those actually in controversy, and thus, having defined the issues, to aid court and jury by directing their attention to the matters in dispute. The second function of the auditor was to form a judgment and express an opinion upon such of the items as he found to be in dispute. In order to perform these functions, the auditor would be required, not merely to examine boods, vouchers, and other papers, and to make computations, but to hear and pass upon conflicting testimony of the parties and of other witnesses. This full hearing, while obviously necessary to enable the auditor to form a trustworthy

> judgment on the disputed items, would serve also to narrow the field of controversy.
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> * * *
>
> It may be assumed that if accepted by the court, the report would be admitted at the trial before the jury as prima facie evidence both of the evidentiary facts and of the conclusions of fact therein set forth. The report, being evidence sufficient to satisfy the burden of proof would tend to dispense with the introduction at the trial before the jury of evidence on any matter not actually in dispute. The appointment of the auditor would thus serve to shorten the jury trial, by reducing both the number of facts to be established by evidence and the number of questions in controversy. A more intelligent consideration of the issues submitted to the jury for final determination would result.

253 U. S. at 307. The Supreme Court expressly upheld the constitutionality of this use of a master in a jury case. *Id.* at 310-11. *Accord, Woods v. Holy Cross Hospital,* 591 F. 2d 1164, 1178-80 (5th Cir. 1979). The District of Columbia Circuit also upheld a reference to a master in a jury case that posed issues far less complex than the calculations in this case. *Tendler v. Jaffe,* 203 F. 2d 14 (D. C. Cir. 1953).

Several district court cases support the use of a master in this case. In *Eastern Fireproofing Co. v. United States Gypsum Company,* 50 F. R. D. 140 (D. Mass. 1970), the court in an antitrust, jury case referred the damages questions to a master after a jury trial on liability. Likewise, in *Connecticut Importing Co. v. Frankfort Distilleries,* 42 F. Supp. 225 (D. Conn. 1940), the court referred anti-

trust damages to a master in a jury case for reasons equally applicable to this case.*

* The complaint alleges that the plaintiff by a conspiracy of the defendants, was wrongfully prevented after January, 1937, from dealing in Frankfort products, a business in which it had theretofore been profitably engaged. The plaintiff claims thereby to have sustained a loss of profits and for this loss it claims treble damages.

As a base for the computation of profits alleged to have been lost for the period subsequent to January, 1937, proof of the plaintiff's profits from dealings in Frankfort products prior to 1937 obviously will be required. From plaintiff's own Exhibit 1 and from the affidavit annexed to defendant's motion it is evident that the taking of such proofs will involve a complicated task and one of peculiar difficulty for a jury. For the plaintiff owns substantial real estate which it uses for purposes of its business; and it does a substantial business in the products of many other producers as well as Frankfort. To ascertain the plaintiff's profits from Frankfort is primarily an accounting task requiring the examination of plaintiff's inventories, sales invoices, books of account, and a mass of documentary evidence covering a substantial period of time as well as numerous complicated computations to accomplish the proper allocation of overhead expenses to the sales of Frankfort products.

Experience has demonstrated that the conventional solution of the problem is far from satisfactory. For if the task is left to expert accountants who examine the records and testify to their conclusions therefrom wide variations between the expressed conclusions are apt to result. Whether one expert or several are called, prudence generally requires that the validity of the expert's conclusions be tested by highly technical and detailed cross-examination which is a voluminous mass of evidence, oral and documentary, much of it conflicting, which in the nature of human limitations tends to bewinder rather than to clarify the jurors' minds.

42 F. Supp. at 226.

Judge Estes in *United States v. Wilson,* 21 F. R. D. 173 (N. D. Tex. 1957), granted a motion for appointment of a special master in a case alleging the unlawful conversion of pinto beans because voluminous evidence would be introduced to prove quantities, percentages, market value and ownership of the beans and because the assistance of an accountant would be necessary to understand and analyze some 22 filing drawers or boxes or records and accounts with regard to the transactions. The court reasoned that:

> A case closely on point with the instant case is Ex parte Peterson, 1920, 253 U. S. 300, 40 S. Ct. 543, 64 L. Ed. 919. There, the dispute involved 402 items arising out of 123 different deliveries made on 91 different days during a period of 11 months. The instant case involves a greater number of separate transactions, which occurred over a period of approximately 21 months, such transactions taking place on many different days within such period of time. In addition to the particular transaction to which the defendants in this case are a party, the plaintiff's evidence shows many transactions of beans going into and being shipped out of the elevators of the warehouseman in question. In computing damages, consideration of the price of the beans, either at the time of the alleged conversion or at the highest intervening market value calls for evidence as to the price of beans on many different dates. This mass of statistical evidence and arithmetic would most likely wear out a jury after many days of such figures, computation and documents. A Special Master, skilled and experienced in such complications, and given time to study and analyze such evidence from both plaintiff and defendants can clarify and simplify the issues to

> be submitted to the jury. The Master's detailed accounting to determine the damages should aid the jury in arriving at a just verdict.

21 F. R. D. at 175. *See also Stockton v. Altman*, 432 F. 2d 946, 949 (5th Cir. 1970) (damage determination within ability of jury, particularly in light of preliminary reference to a master).*

One very valuable function of the master's report would be to assist the court in evaluating motions for summary judgment. Plaintiffs respectfully suggest that, should

* The above cases are all jury cases. Decisions referring complicated damage issues to masters are legion in non-jury cases. *Equal Employment Opportunity Commission v. Enterprise Association Steamfitters*, 542 F. 2d 579, 588 (2d Cir. 1976); *Pettway v. American Cast Iron Pipe Company*, 494 F. 2d 211, 258 (5th Cir. 1974); *United States v. Masonry Contractors Association of Memphis, Inc.*, 497 F. 2d 871, 876 (6th Cir. 1974); *Southern Agency Company v. LaSalle Casualty Company*, 393 F. 2d 907, 914 (8th Cir. 1968); *Magna Leasing, Inc. v. Staten Island Mall*, 428 F. Supp. 1039, 1044-5 (S. D. N. Y. 1977), *aff'd*, 564 F. 2d 567 (2d Cir. 1977); *Senter v. General Motors Corporation*, 383 F. Supp. 222, 228-30 (S. D. Ohio 1974), *aff'd*, 532 F. 2d 411 (6th Cir.), *cert. denied*, 429 U. S. 870 (1976); *Ellison v. Rock Hill Printing & Finishing Company*, 64 F. R. D. 415, 419 (D. S. C. 1974); *Gottleib v. Sandia American Corporation*, 304 F. Supp. 980, 992 (E. D. Pa. 1969); *Foster v. City of Detroit, Michigan*, 254 F. Supp. 644, 669 (E. D. Mich. 1966); *Mitchell v. Gulf, Mobile & Ohio R. Co.*, 91 F. Supp. 1975, 187 (N. D. Ala. 1950). *Cf. Poster Exchange, Inc. v. National Screen Service Corp.*, 456 F. 2d 662, 668 (5th Cir. 1972) (a protracted antitrust case in which the Fifth Circuit suggested that a master be appointed to determine which questions were still actually in dispute); *Mitchell v. Mitchell Truck Line, Inc.*, 286 F. 2d 721, 725-6 (5th Cir. 1961) (the Fifth Circuit explained the tendency of law to estimate damages which cannot be ascertained with exactitude and suggested that the district judge could refer the "accounting phase of the case and related matters to a master.").

defendant seek to delay entry of judgment, it may be somewhat difficult for this Court to determine whether, for example, a controversy concerning the legibility of invoices is real or contrived. A master could be of great assistance in defining the issues which are subject to a bona fide dispute, rather than simply a contrived dispute.

As to those issues of fact that continue to be disputed so that they cannot be disposed of by summary judgment, the master's report would be *prima facie* evidence of the amount of single damages. *In re Peterson*, 253 U. S. 300, 307 (1920); *Carpa, Inc. v. Ward Foods, Inc.*, 536 F. 2d 39, 53 (5th Cir. 1976); *Burgess v. Williams*, 302 F. 2d 91, 94 (4th Cir. 1962); *Gay v. United States*, 118 F. 2d 160, 162-63 (7th Cir. 1941); *Eastern Fireproofing Co. v. United States*, 40 F. R. D. 140, 142 (D. Mass. 1970); Moore, *Federal Practice* ¶ 53.14[4].

Implicit in this Court's procedure to date is the conclusion that issues of violation, impact, and measure of damages may be submitted to one jury, and the determination of the actual quantum of damages may be submitted to another jury if that issue is not resolved by summary judgment and defendants insist on a jury trial. Since the facts relevant to the former set of issues are distinct and separate from those necessary to prove the latter, the conclusion that they may be tried separately is fully supported by settled law.* *See, e.g., Gasoline Products Co. v. Champlin Refining Co.*, 283 U. S. 494 (1931); *Alabama v. Bluebird Body Co.*, 573 F. 2d 309, 318 (5th Cir. 1978); *Arthur Young & Co., Inc. v. United States District Court*, 549 F. 2d 686, 692-94, 696 (9th Cir. 1977); *In re Master Key Antitrust Litigation*, 528 F. 2d 5, 12 n. 11 (2d Cir. 1975); *Terrell v. Household Goods Carrier Bureau*, 494 F. 2d 16 (5th Cir. 1974); *Woods Exploration & Produc-*

* This issue arises most frequently when appellate courts remand for a trial on less than all issues.

tion Co. v. Aluminum Co. of America, 438 F. 2d 1286 (5th Cir.), *cert. denied,* 404 U. S. 1047 (1971). *In re Plywood Antitrust Litigation,* 1979-1 CCH Trade Cas. ¶ 62,459 (E. D. La. 1978), *appeal docketed; LoCicero v. Humble Oil Refining Co.,* 52 F. R. D. 28, 30-31 (E. D. La. 1971) (Rubin, J.); *Impervious Paint Industries Ltd. v. Ashland Oil, Inc.,* 1980-1 CCH Trade Cas. ¶ 63,138 (W. D. Ky. 1980); *In re Gap Stores Securities Litigation,* 79 F. R. D. 283, 305 n. 22 (N. D. Cal. 1978); 9 Wright & Miller, *Federal Practice & Procedure* § 2391, at 302-03. *Cf. Union Carbide and Carbon Corp. v. Nisely,* 300 F. 2d 561 (10th Cir. 1961) (approving use of master to calculate amount of damages after jury trial on liability), *cert. dismissed,* 371 U. S. 801 (1962); *Goldfarb v. Virginia State Bar,* 421 U. S. 773, 776 (1975) ("trial only on issue of liability").

Conclusion

For the reasons set forth above, class plaintiffs believe that the entry of final judgment in this case should proceed with the appointement of a master, a report by the master within sixty days, prompt resolution thereafter of issues susceptible to summary judgment, and a trial of disputed issues early next year. There is ample precedent for this procedure.

Respectfully submitted,

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By: /s/ STEPHEN D. SUSMAN
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On Behalf of Class Plaintiffs

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M. D. L. No. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

ALL CLASS ACTIONS

ORDER

Having considered the briefs of the parties, and having hereby found the certain issues necessary for entry of judgment are complicated, the following procedures preparatory to entry of document in M. D. L. 310 are hereby ORDERED:

(1) _____ is appointed a master pursuant to Fed. R. Civ. P. 53(b).

(2) Within sixty days of the entry of this order, the master should report on the following matters:

(a) the dollar value of corrugated containers and sheets sold by The Mead Corporation and its co-conspirators (as found by the jury) to class members who have elected to remain in the class, for the period March 7, 1973, through December 31, 1975; and

(b) the dollar amount of the settlement funds in the class cases that reasonably can be attributed as

being given by co-conspirators (as found by the jury) in consideration for release and dismissal of claims of class members against those co-conspirators for the period March 7, 1973, through December 31, 1975.

(3) The master's report should set forth the issues not subject to a bona fide dispute and the issues subject to a bona fide dispute, and for each issue subject to a bona fide dispute the master should render an opinion.

(4) All parties should have access to a prior draft of the master's report, and an opportunity to provide written comments to the master.

(5) The master is authorized to employ any consultants or staff that he believes is necessary for him to perform his prescribed tasks.

(6) All motions for summary judgment on the issue of the dollar amount of damages should be submitted within fifteen days of the master's report.

(7) All responses to any motions for summary judgment should be submitted within fifteen days of the above deadline for filing motions for summary judgment.

(8) Oral argument on any such motions for summary judgment should be had, at the convenience of the Court, within ten days from the filing of all responses to those motions.

DONE this _____ day of _____, 1980, in Houston, Texas.

_____

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

This is to certify that on the 10th day of October, 1980, a true and correct copy of the foregoing was served by regular mail with first class postage affixed to the offices of:

Harold Baker, Esq.
Jerrold E. Salzman, Esq.
William E. Wright, Esq.
John D. Roady

STEPHEN D. SUSMAN
Stephen D. Susman

EXCERPTS FROM TRANSCRIPT

THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE: CORRUGATED CONTAINER
ANTITRUST LITIGATION

TRANSCRIPT OF PROCEEDINGS
JUNE 12, 1980
VOLUME 6
(MORNING SESSION)

• • •

[79]

ALEX HOPKINS

Q. Probably the best way to approach this is if you will give us, just list the corporations that you recall having price communications with, then we'll go back over that list and try to get some details on each one.

A. Alton Box Board—Do you want the different locations?

Q. Yes, please.

A. Jonesboro, Arkansas, Alton, Illinois, Humbolt, Tennessee, Murfreesboro, Tennessee; Allen Stone Boxes, Halls, Tennessee; Arkansas Container Corp., Tennessee; Arkansas Container Corp., Little Rock, Arkansas; Anderson Box, Tyler, Texas and Indianapolis, Indiana. Bates Container, Fort Worth, Texas; Boise Cascade Corporation, West Memphis—That's Arkansas; Consolidated Packaging, Houston, Mississippi, and Memphis, Tennessee; Container

Corporation—Container Corporation of America, Muskogee, Oklahoma; Container Corporation of America, Memphis, Tennessee; Continental Can, Rogers, Arkansas; Denty Container, which is no longer——

Q. You say it's no longer?

A. No, it's been purchased by Time, Time Industries,

[80]

I think. Hortman, North Little Rock, Arkansas; Hoerner Waldorf, Springfield, Missouri, Sand Springs, Oklahoma, Memphis, Tennessee, Fort Smith, Arkansas, Little Rock, Arkansas; Inland Container, Hattiesburg, Mississippi; International Paper, New York; International Paper, Houston; International Paper, Kansas City, Spring Hill, Louisiana. And I have Russell, Arkansas down here but the fellow I talked to there was at Spring Hill when I talked to him so——

Q. That's with International Paper?

A. Yes. Mead Containers, Memphis, Forth Smith; Midland Container, Jackson, Mississippi; Olinkraft, West Monroe, Louisiana, Fort Smith, Arkansas; Owens-Illinois, Kansas City, Memphis; Southern Missouri Container, Springfield, Missouri; Southern Paper Box, Little Rock and Benton, Arkansas. St. Joe Paper, Memphis, Tennessee; St. Regis Paper, Clarksdale, Mississippi; Tate Container, Fort Smith, Arkansas; Time Container, Fort Smith; Weyerhaeuser, Florence, Alabama, St. Louis, New Orleans——

[81]

Q. New Orleans?

A. Yes, Jackson, Mississippi, and there's probably others that I can't recall.

Q. Let's begin with Alton Box in Jonesboro. Who did you have price communications with in Jonesboro?

A. Dan Beard, John Medlock, Maurice Wood."

Mr. Arps: Your Honor please, I object to that pictorial representation. There is nothing—the answers—they mention the man's name but they don't mention what his connection with whatever company it is. Why can't he mention them and then proceed, although it doesn't hurt me any. It doesn't mention Westvaco, as you know, but I think that's just absurd.

The Court: I'll overrule that objection, Mr. Arps. I think this is a logical way to present it to the jury.

(Continued reading of the Deposition:)

"Q. What is Mr. Beard's position?
A. He's now the General Manager at Jonesboro.
Q. And, Mr. Medlock's?
A. He was General Manager.

* * *

[91]

"Q. Are you sure that you spoke with Mr. Lester in 1975?

A. Yes.

Q. Do you recall the accounts that were involved in this?

A. Rockwell Manufacturing, Jackson, Tennessee is one. And, let's see, gosh, I'm going blank here.

Q. That's okay, we'll go on to something else and if it comes to your mind, let us know.

A. Okay.

Q. These price communications with Lester, Thornton and Collins, what type communications were they, telephone, mail, meetings, all of them?

A. I met them at the Fibre Box Association, and they were mail—the majority, telephone calls.

Q. And what was the result of these communications?

A. We got in line with their prices.

Q. In most cases did these meetings flow both ways; were they seeking price information from you?

A. Yes.

Q. And, you were seeking it from them?

[92]

A. Yes.

Q. And, each of you got in line during those occasions?

A. Yes. In 1970, when I was—John Medlock was taking my prices and in some cases, cutting them, and I couldn't get John to more or less straighten up and fly right. So I sent my salesman over to Jackson, Tennessee to Rockwell Manufacturing, or Rockwell International, I think is the name, to get a chance to quote on their requirements, which he did and which I assumed I was cutting the price because I quoted it quite low, and Clarke Thornton called me and said, 'How come you're doing this,' and I said, 'Well I can't get any satisfaction out of John Medlock in Jonesboro, so I just thought I'd get his boss' attention which Clarke was, John was. He was over the region.'

[93]

Q. Thorton was regional manager?

A. Yes, and I figured, 'I'd been waiting for your phone call because I knew when I cut your best account right your back yard, you'd holler at me,' and I said 'If you can't do anything with John Medlock, I'm going to continue to do it, and he said, 'Well, I'll get that problem straightened out, and he called me back and he said, 'You're not going to have any more problems out of John.' And I said 'Okay, I'll take my prices out.'

Q. You withdrew your quote to Rockwell?

A. Right.

Q. Do you recall when that was?

A. That was probably in 1970, '71.

Q. Was anyone else at Macmillan Bloedel aware of either that price communication or others that you mentioned with Lester Thornton or Collins?

A. Well, at that particular time I was telling you about, Ralph Michaels was regional manager and I'm sure I discussed it with him.

Q. Michaels was regional manager?

A. Yes.

[94]

Q. That was with Hankins, is that right?

A. Yes.

Q. Who else in your office would have those communications?

A. Dave McPherson, my sales service manager and Buster Babb who was sales service manager, now he's on the sales desk, did, oh, in 1970, I guess.

Q. Did Dave McPherson communicate with each of these companies that you've listed communicating with?

A. Yes, sir. He's communicated with Jonesboro, Humbolt, not Alton, Illinois or Murfreesboro, Tennessee, Halls, Tennessee, Allen Stone, yes."

Mr. Montague: Your Honor, we will now read from a transcript of a prior proceeding dated March 12th, 1979.

"Q. Mr. Hopkins, while sales manager at Macmillan Bloedel's Little Rock plant, have you ever spoken to competitors and asked for the prices they were quoting to a particular customer on corrugated boxes or sheets?

A. Yes, I have.

[95]

Q. Were you given that information?

A. Yes, I was.

Q. When you obtained this information, what did you do with it?

A. If I asked for information, I usually broke it back on a profitability basis to see exactly what level it was on and at that point I made a decision as to whether I wanted to more or less subscribe to that number or not as far as accepting it. If it was below cost, I probably wouldn't. And if it had a profit in it, I would probably go along with the price.

Q. Now, what do you mean, sir, if it had a profit you would go along with the price?

A. Well, once I had the bottom figure, and I broke it back up the line, then I could tell whether it did have a profit in it. And if it was way below cost, and I was going to lose money on it, naturally I wouldn't accept the business or I wouldn't quote the price and be competitive. I would either not quote it or quite it high and probably wouldn't get the business at that point.

Q. And if it was a profitable account, how

[96]

would your prices that you put in on the bid to the customer compare with the price you got from your competitor?

A. They would be competitive with his.

Q. And what do you mean by competitive, sir?

A. I would say in the range of a half a percent or a percent, one way or the other.

Q. Basically, then, your profit would be at the level of your competitor or above?

A. Yes. They wouldn't vary a percentage point.

Q. While sales manager at Little Rock, have you ever been called or contacted by competitors and asked for your prices on a particular account?

A. Yes.

Q. And what did you respond?

A. If they called me and they were more or less the right type individual, then I would probably give it to them. I would give it to them.

Q. And what did you expect your competitors to do with this information?

A. To honor my prices.

Q. What do you mean by that, sir, to honor your prices?

[97]

A. Be in the ball park one percent, half a percent, one way or the other.

Q. In other words, not to cut your prices?

A. Right.

[98]

Q. Was it your understanding in your market area that when a corrugated box manufacturer obtained pricing information from a competitor, those prices would be honored?

A. Well, I don't know what a corrugated manufacturer would do with a competitor. My understanding is if I give my numbers out, they are to be honored, And if I ask them for numbers, I will honor them, if that answers your question.

Q. Yes, sir. Does defendant Mead Corporation have corrugated box plants in your market area?

A. Yes, they do.

Q. And where are these located?

A. Fort Smith, Arkansas and Memphis, Tennessee.

Q. Turning first to the Memphis, Tennessee Mead plant, have you had communications with Mead employees at that plant concerning the prices of corrugated boxes and sheets?

A. I had price communications with them concerning corrugated boxes, not sheets.

Q. With whom have you had such communications?

A. Ewing Halford and Sims Dailey.

Q. And what is Mr. Halford's position at the

* * *

[132]

out of it, either.

Q. Based on your experience in your market area, do you have an opinion as to how widespread this practice of price communications was?

A. Well, I know for a fact it was in that seven or eight states that I just mentioned, plus the fact that my opinion is that it was local situations that evolved all over the United States and I'm not so sure——

Q. Sir, could you tell us what you base your opinion upon that this was occurring elsewhere?

A. I think, as I have testified earlier, that if I wanted to know the marketplace, and when a new account was moving into my area, how I would—my operating procedures were to try to get the levels in that account either by calling personally, if I knew those people, or calling one of our sister plants and ask if they knew; and they said, 'Yes, I think I can get that information,' and they got back with me on that information.

I wasn't present in their office when they made the phone call, but I think your question was what was my opinion, and that

[133]

is my opinion, that it was going on in other areas other than my own.

Q. All right, sir. I got the impression today, Mr. Hopkins, and also from your grand jury testimony, that without trying to be specific, that frequently your competitors protected your prices after you had given them to the competitors, but frequently your competitors also cut prices after you gave them out. Is that correct?

A. The majority of the time the prices were honored. There is certainly a percentage of the time they weren't.

Q. All right, sir. And I believe it's also true, is it not, that sometimes when you got a competitor's price you just found that it was far too low, even below your cost, for you to compete?

A. This is true.

Q. And on those occasions, of course, you would either not quote at all or you would just deliberately price yourself out of the ballpark?

A. Yes, sir, I testified to that.

Q. Could you tell us what the purpose of your

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THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE:
CORRUGATED CONTAINER
ANTITRUST LITIGATION

TRANSCRIPT OF PROCEEDINGS

JUNE 12, 1980

VOLUME 7

(AFTERNOON SESSION)

• • •

N. LACEY

[291]

Q. Why should you give another supplier your prices?

A. So that he wouldn't cut my price. I didn't want to lose my profitability in that account, nor to lose my share of that account.

Q. What was your understanding as to why another supplier would give you his prices?

A. So that I wouldn't cut his price.

Q. Did you ever give erroneous pricing information to another supplier?

A. Not to my knowledge, no, sir.

Q. Did you ever receive erroneous pricing information from another supplier?

A. No, sir, not to my knowledge.

Q. When you got a price from another supplier, sir, did you ever cut that price?

A. No, sir.

Q. Why not?

A. If I were to cut his price in an account, he would then seek out one or two of my accounts. A general rule of thumb was two for one and lower my prices in my account.

Q. What was that now? What did you just say, sir, the rule of thumb?

A. If you were going to retaliate, you would take two for one. That would get their attention.

[292]

Q. Accounts would frequently follow salesmen?

A. Yes, sir.

Q. When you were in the corrugated business, had you ever heard of the term, "intelligent price"?

A. Yes, sir.

Q. What does that mean?

A. To not cut the price.

Q. How many quotes—like, say, the Arlington plant, how many quotes would you typically make during the course of a week to customers?

A. I don't remember specifically. I would say in the area of possibly an average of two, maybe a little bit higher than that.

Q. Two a week?

A. Yes, sir.

Q. How many times were you on the phone during a week?

A. In Arlington?

Q. Yes.

A. I would estimate at least four days a week.

Q. Well, did you discuss with your competitors or other suppliers every quote you made?

A. If it was their item, their account, yes, sir.

Q. Now how many quotes did you typically make while you were in San Antonio?

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A. It may have averaged one a week. It might have been a little higher than that.

Q. How often were you on the phone while you were in San Antonio?

A. I would estimate probably two to three times a week.

Q. How come you were on the phone more than you were quoting?

A. Because my competitors were calling me for my market, my current prices.

Q. Couldn't you get some of this price information from customers?

A. Yes, sir, occasionally you could.

Q. You couldn't get it always from customers?

A. Oh, no, not always. No, sir.

Q. Well, when you got it from customers, did you bother to call the other suppliers?

A. Yes, sir.

Q. Why?

A. I wanted to make sure the information I had was correct.

Q. Now how many other suppliers would there typically—like, I mean in Arlington, you have listed a number of suppliers there. Would all those suppliers typically be supplying an account at the

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IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE:
CORRUGATED CONTAINER
ANTITRUST LITIGATION

TRANSCRIPT OF PROCEEDINGS

JUNE 17, 1980

VOLUME 12

(AFTERNOON SESSION)

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[263]

R. REDMOND

Q. Mr. Redmond, do you know Gene Beeken, Eugene Beeken, from Westvaco?

A. Yes, sir.

Q. Do you recognize him in the courtroom, sir?

A. Yes, sir.

Q. Did you ever exchange price information with him?

A. Yes, sir.

Q. Was it current prices?

A. Yes.

Q. And did you honor the prices you had received from Mr. Beeken?

A. Yes, sir.

Q. To the best of your knowledge, did he honor yours?

A. Yes, sir.

Q. In your opinion, Mr. Redmond, was there an understanding among the major corrugate companies during the sixties to honor each others prices?

A. Yes, sir.

Q. In your opinion, sir, was there a meeting of minds among the companies on this subject?

A. It was an understanding that you'd have to go through to understand. But it was definitely an understanding.

Q. Were you part of that understanding, sir?

A. Yes, sir.

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Q. What, to your knowledge, was the geographic scope of that understanding?

A. Well, it was—I feel it was nationwide.

Q. What was the purpose of that understanding so far as you were concerned, Mr. Redmond?

A. Would you repeat that question. The understanding?

Q. What was the purpose of that understanding?

A. The purpose was to maintain or improve price levels.

Q. Do you think the understanding was effective?

A. Yes, sir.

Q. Were efforts made by you, Mr. Redmond, and others who you dealt with, to your knowledge, to conceal the exchange of pricing information?

A. Yes, sir.

Q. Could you tell the jury some of the things you did to conceal the fact that you were exchanging price information?

A. Well, when this initially happened,—I can't recall exactly when, but my boss instructed me not to send price lists out with the company's stationery.

Then the next step was to remove any evidence of your company name on the price list.

And then we were told to meet for

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IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE:
CORRUGATED CONTAINER
ANTITRUST LITIGATION

TRANSCRIPT OF PROCEEDINGS
JUNE 23, 1980
VOLUME 17
(MORNING SESSION)

[36]

DANAHEY

Q. Now, then, your answer to my previous question about whether you've ever had an agreement with a competitor was incorrect?

A. It's all in interpretation. Yes, I would say I did not answer your question properly. I should say there was an agreement, but again it was unwritten.

Q. So that in the period of time that you were Sales Manager in the sixties you exchanged past market prices with employees of competitors; is that your testimony?

A. Yes.

Q. And now it's your testimony that you had an agreement with those employees of competitors that you would not cut their prices if you received that information; is that your testimony?

A. Yes.

Q. And, likewise, if you gave a past market price to an employee of a competitor, it's now your testimony that you would expect that they would not cut your price; is that correct?

A. Yes, I would expect.

Q. Now, you testified, I believe, that you

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IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE:
CORRUGATED CONTAINER
ANTITRUST LITIGATION

TRANSCRIPT OF PROCEEDINGS

JULY 7, 1980

VOLUME 33

(MORNING SESSION)

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[14]

E. SCHECHTER

Mr. Susman: Your honor, plaintiffs move the admission of Exhibit 4813.

The Court: All right. It will be admitted into evidence.

Q. (By Mr. Susman). Now, Mr. Schechter, between 1963 and 1965 were you or the sales managers who reported to you on the phone with all of those companies except for Crown-Zellerbach?

A. Yes.

Q. In your opinion, sir, from 1963 to 1975, was there a general understanding or a gentlemen's agreement among the companies that were on the phone in your area that

they would be constructive in the marketplace and honor each other's prices?

Mr. Irvine: I object to the extent it is beyond his opinion, your Honor, as to his understanding.

The Court: I will let him express his opinion.

Mr. Susman: All I asked him was an opinion.

The Court: I will let him express his opinion. I will overrule the objection.

A. Yes.

* * *

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE:
CORRUGATED CONTAINER
ANTITRUST LITIGATION

TRANSCRIPT OF PROCEEDINGS
JULY 28, 1980
VOLUME 55
(AFTERNOON SESSION)

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Honor.

The Court: You rest?

Mr. Susman: Well, your Honor, we rest pending—we want to hold the record open for some interrogatory answers on sales that we did not receive from Mead. The court will recall an order entered. Those orders have never been forthcoming, your Honor. But pending the introduction of these exhibits, your Honor, we rest.

The Court: All right.

What say the defendants?

Mr. Arps: What do you mean?

The Court: What say the defendants? Are you ready to go forward with your witnesses?

Mr. Baker: We are ready, your Honor.

Mr. Arps: Yes, sir.

Your Honor, could I just——

The Court: Are you ready? If I give you a fifteen-minute recess, will you be ready to go forward with

* * *

[180]

in fact a conspiracy.

Mr. Arps: I take it, your Honor, that I can take an exception to that and that I will be given permission to renew that at the end of the——

The Court: Certainly. I am certain that Mead will want to make a motion at the conclusion of all of it.

Mr. Baker: Well, I want to make a motion when the record is closed, and the record is not yet closed.

The Court: Well, you don't want to make any other motion other than the motion for directed verdict, do you?

Mr. Baker: I want to make a motion for directed verdict with respect to the sheet class, that there has been insufficient evidence to go to the jury in connection with the sheet class; and, secondly, I want to make a motion for a directed verdict with respect to the Mead Corporation, in addition to the sheet class, and the totality, on the grounds that there has been shown no nationwide impact.

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The Court: All right, sir.

Now, let me say, you make that motion in whatever form you want to make it and let the record reflect that I have considered it and overruled it.

Mr. Baker: But before, really, I make it, I would like to hear them say, "I rest."

The Court: Okay, Mr. Baker.

Mr. Arps: Of course, that is my same problem.

The Court: I understand.

Mr. Susman: Your Honor, we introduce exhibits 4890 to 4989, 4990 to 5000, 5003 to 5008D.

And I told your Honor we have a motion pending on exhibit 5001, which is a summary of the manufacturers from which plaintiffs, representative plaintiffs, purchased.

We have filed a motion on that, to introduce a summary into evidence.

Mr. Arps: I don't recall it.

The Court: I haven't seen it.

Mr. Arps: I'm not saying that we

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[210]

very clear. I have already got the exhibit.

Mr. Montague: We are not asking that these be read to the jury, only that they be attached.

The Court: I understand that. This is going to be attached to this list.

Mr. Susman: Thank you, Your Honor.

Mr. Montague: Okay.

The Court: (addressing deputy courtroom clerk) take off the top. Take off the top, summary of deposition testimony, and attach this to this list and put it in there this way, and show it to them and let them work it out with those others.

Mr. Baker: Your Honor, could I leave one thought with you to be thinking about when you're driving back and forth to work?

The question of claim reduction, like the question of trebling of damages, is a question of law for the court to decide after the jury decides the damages

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in the case.

The Court: I know it.

Mr. Baker: I just throw that out.

The Court: I know it. I thought originally—have been thinking of tellin the jury something about that——

Mr. Baker: What I am suggesting——

The Court: —In my instructions to the jury.

I don't know whether to do that or not. If you go on a percentage basis, I don't see any reason to.

Mr. Baker: Well, I do, because I think it's a question of law for the court.

A jury always comes back with, "The Damages for this cause of action are 'X'," and then the court either trebles it and doesn't tell the jury, because

the law says they treble it, or the court throws it out, or the court cuts it in half in accordance with the law that the court decides is none of the jury's business.

The jury is deciding as a matter of

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fact what is the damage dollar impact here.

The Court: But, we can't do it if you don't get these gross sales here.

Mr. Baker: That's what I'm saying. Let us work on that.

Mr. Black: You'll have to be a little flexible with us in terms of demanding that we close our case immediately if we are going to work on that.

Mr. Baker: Maybe your case can be closed subject only to.

The Court: That's fine.

Mr. Black: Sure, something like that.

The Court: Let's close it subject to you doing something.

Mr. Arps: I want to be dead sure that it's subject to that single item, because you keep opening the door and opening the door.

The Court: I am not going to let them reopen this case.

Mr. Black: We don't want to.

The court: They've got all the

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evidence in save and except this gross sales.

Mr. Arps: All right. That's fine with me. We can work it out.

The Court: And if you can work out a figure on gross sales, then you can argue with me about whether we go on a damage or whether we go no a personal issue.

Okay?

Mr. Arps: Okay, Your Honor.

The Court: We will take a 15-minute recess. How long is this—what do you have?

Mr. Arps: What we are going to do is just show a slide presentation.

Mr. Baker: It will take the rest of the afternoon.

Mr. Plevan: Your Honor, it will take 45 minutes of slide presentation and 45 minutes of testimony.

The Court: You can put the slide presentation on this afternoon.

Mr. Plevan: Yes. We will show the slides first and then go right into the

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE:
CORRUGATED CONTAINER
ANTITRUST LITIGATION

TRANSCRIPT OF PROCEEDINGS

AUGUST 26, 1980

VOLUME 85

(AFTERNOON SESSION)

• • •

R. NEFF

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I didn't originate that one.

Q. In any event, the earlier meetings were either meetings—a number of people present, where you were trying to figure out whether everyone understood what they were to do.

A. (Nodding.)

Q. Or, as you pointed out, they had an open line to Mr. Sebaly, and no one today has cast any light on whether Mr. Sebaly got anything over that open line except Mr. Redmond, who testified that he called——

A. Well, you got my documents, and my documents

Q. I'm sorry, you and Mr. Redmond.

A. I know Mr. Redmond's testimony, I know my actual actions.

Q. Okay. In any event, sir, the interview notes which we have now seen on the screen, generated in the Fall of '75, when the real probing began, reflect, sir, that 12 of the 41 people interviewed, or 29 percent of those with pricing authority in the container division, had violated HO-9 and S5.008, isn't that correct, sir?

A. I don't know that to be correct. You are saying they are violations——

Q. Let's have, please, C19.

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I'm going to do this as quickly as I can.

Okay. We begin—what I have done, sir, is taken—the jury has never seen these all at one time, the 41 of them all together. We have had bits and pieces of them scattered through the trial. And I'm not going to read them all, I have just organized them all in a way that I want to see whether you agree with me.

A. I think you have two that are not in evidence, don't you, Mr. Susman?

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Mr. Baker: You objected to this the other day, but if you want to go ahead and use it, I don't have any objection to using it.

You objected, and I was ordered to go ahead and take it down.

Mr. Susman: We would like to use it with Mr. Neff.

Mr. Baker: All right. I don't object.

Q. This is Mr. C. Baker, general manager of Lewisburg. "Have exchanged prices charged to common customers, and they have respected each other's price levels. Previously had same program—" Well, that's enough. There is a violation of the policy, okay? That's number one, with Mr. Baker. It's not necessary—he has said a whole lot of other things.

Mr. Baker: Well, could I suggest that that is an improper question, because we are talking about a plaintiff in this lawsuit that he is talking about, a plaintiff, a sheet plant.

The Court: I don't know, Mr. Baker, what that means. He is an employee of Mead?

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Q. Go ahead, sir. Mister—this Mr. Baker—and his first name is what?

A. Charles.

Q. Charles Baker. He said that, "Previously had same program with General Box until early 1975, when we stopped supplying them."

That's the program of exchanging prices, and General Box—isn't that Southwest Forest?

A. I don't think at that time it was, Mr. Susman.

Q. They became Southwest Forest?

A. They are a sheet plant in Tennessee somewhere.

Q. "Said this was totally stopped recently, when grapevine spread the word of this program," this program being what Mr. Baker was doing?

A. Yes.

Q. I mean, he heard—this is a man who was exchanging prices with competitors until he heard, via the grapevine, that Mr. Baker and Mr. Wheland were gathering

together six months of expense records and hitting the trail to confront them.

A. Not unlike any organization, Mr. Susman, we have grapevines in ours.

Q. In any event, "Has also received prices from another sheet plant, Ohio Valley, who asked him to respect these prices," and say, "To date we have not

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quoted Ohio Quaker. Alton contacted him about one and one-half years ago for price information, but he turned them down because he didn't trust them. No other contacts with major companies. Says word is out that C. C. A. has cut off communications."

The next one, then, is Mr. Blasdell.

A. To answer your question, I agree with this.

Q. It's a violation?

A. It's a violation, no question.

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Q. Next one, Bob Blasdell stated he also on occasion has received calls from competitors of same nature and has placed some. Refused to identify competitors involved.

And that's a violation of the policy, isn't it?

A. I think you probably ought to read the quotation there, so that you get the proper context. Maybe it's unnecessary, because it is a violation of the policy.

Q. Okay. I'm not trying to say how bad the violations are, I'm just —there is a violation of the policy.

A. That's clear.

Q. Clear. Okay. Now, Mr. Bob Cagler. "Another competitor called him and asked him whether if he sent his price list to Cagler, whether Cagler would confirm whether or not Mead was 10 percent under the com-

petitor's price list, as has been reported to the competitor. The competitor was Wilson, Sales Manager, Container Corporation at Muskogee, Oklahoma. He—"meaning Cagler, your employee—"—obliged and did receive the price list. He very candidly stated that he thought this was okay," et cetera.

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Clear violation of the policy, right, no question?

Mr. Baker: Read the rest of it, would you?

Q. "He very candidly stated that he thought this was okay, but that if it were not, he would not do this again. I told him it should not be done. Do not believe there is a future worry here."

A. It's an error, and it's a violation.

Q. It's a violation?

A. Certainly.

Q. Buster Crafts. "No exchange of price information with competitor since last December. Prior to that did advise competitors what we were going to do price-wise, at direction of J. Franey."

Not much question about that one, either, on Mr. Crafts or Mr. Franey?

A. Clearly.

Q. Okay, next. Wilson Dorff. "Has placed and received three or four calls with competitors regarding price information within past year. Cites calls with P. C. A., Embers, St. Regis. Says they stopped after sales meeting in December last year when Garth Miller—" that's the guy who got up and talked about the grand jury

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appearance, and Mr. Wheland spoke antitrust compliance, okay?

A. Yes, sir.

Q. No question about Mr. Dorff?

A. Violation of the policy.

Q. Mr. Franey is clear, too. "Not at Louisville until June. Prior thereto Gardner. Has engaged in price communications with competitors. He doesn't talk about specific price, but he does take and initiate discussions like, 'you are deteriorating the market' et cetera, and would talk about price in terms of percent rather than absolute dollars."

That's clearly a violation of the policy, isn't it, sir?

A. Yes, sir.

Q. "He formerly verified prices with competitors. Since he arrived in Louisville, he has stopped initiating calls to competitors, but has been receiving calls and discussing prices."

And to pinpoint again when he arrived in Louisville, it was in the middle of 1975?

A. I think earlier, sir.

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Q. Okay. In any event, it was after, again, after the violations became a felony and Garth Miller scared everyone in December of '74, right?

A. I would, Mr. Susman, tell you that it's very questionable that he violated the policy in Louisville, in my mind.

Q. Now, Mr. Gestrich—well, let me say, based upon what he told Mr. Baker, it says, "Since he arrived in Louisville he has stopped initiating calls to competitors, but has been receiving calls and discussing prices."

Okay. Now, if he told Mr. Baker the truth, and Mr. Baker accurately recorded it, then no question, he violated it even after he got to Louisville, right?

A. He violated the policy, I give you that.

Q. Mr. Gestrich, there's no question about, "Has exchanged price information with competitors a half dozen times in last six months."

Apparently the December meeting did not scare him enough.

Mr. Glankler: I move to strike counsel's statement.

Q. It didn't, did it?

A. You lost me in the interchange, can you tell me

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what your question was?

Q. We got September, 1975, Mr. Gestrich had already attended a December meeting. You remember that meeting, where Mr. Wheland and Mr. Miller spoke? Mr. Miller spoke about his appearance before the Grand Jury. Mr. Gestrich even after that meeting, as he says, had exchanged price information with competitors a half dozen times in the last six months. Still going on, but at decreasing frequency a year or two ago much more frequent. Has recently exchanged with Greif Brothers, Boise, P. C. A., O. I. Most of these have been initiated by us, primarily by phone or in mail, not in person.

A. Clear violation.

Q. Clear.

Mr. Honsberger. "Has had price communications with competitors in past, but he has shut them off in past year. Prior to 1975 lots of talk went on in zone, and had highest price of any zone in country. This had dried up because the leaders, C. C. A., Mead, Diamond International, St. Joe and Weyerhaeuser, have stopped talking. During the past year he has received and rebuffed calls from Binghamton Con-

tainer, Division of Chesapeake. Written exchange of price information

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went on in past, but not now."

Again, a clear violation of the policy, and Mr. Honsberger does appear to have been influenced by Mr. Miller's speech in December of '74?

A. He cut it off.

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Q. Ed Serger. "No exchange of information on a one-on-one basis, but has told group that he is in trouble on a specific account, and he knows who price cutter is. Price cutter in group. Occurred last year at F. B. A. Christmas party, and says price cutter got the message."

Again, talking about prices or competitive information with competitor, a clear violation of the policy?

A. Yes, sir.

Q. And so even if Mr. Serger actually made a full confession to Mr. Baker, told him everything—and there is some reason to believe he may have some hesitancy—he had violated the policy.

The next one, now, sir, is Mr. Skiver, who testified here. "No communications regarding prices with competitors in last year or so. Did so some years ago to convince competitors that we were not price cutters."

Again, if you believe what this reports, a clear violation of Mead's policy, okay?

A. Yes, sir.

Q. Bob Snell. "Has engaged in communications with competitors in prior years. In prior F. B. A. zone was talkative lot and very close knit for years.

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This seemed to dry up last fall—" last fall is when the felony statute came into effect "—with the result that prices have dropped. In '75 he has received calls—" wait a minute, the communication has dried up, with the result that prices have dropped. "In '75, he has received calls from Lawless, St. Joe and Continental Can and rebuffed them. Also he called Weyerhaeuser to indicate that we were raped at a specific account. Things have really dried up in last three months. Has also received copies of prices or price quotes in mail in '75, threw them away. Hasn't sent anything for a long time. Used to talk about prices to common customer with sheet plant, but no longer. Stopped contacting competitor for verification of prices last year.

Mr. Arps: If your Honor please, I don't suppose it makes a bit of difference whether I can see that or not——

The Court: You can move around, if you want to.

Mr. Arps: I wouldn't Mind, if he would read it loud enough, then I

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wouldn't object.

The Court: All right, sir.

Q. In any event, not much question that Mr. Snell, prior to 1975, was violating your compliance policy?

A. That's right.

Q. Mr. Whitten. "In early 1974, when he first started job, Alton called him regarding prices for particular account, which he gave them, but didn't ask them for their prices. After December—" well, there is a violation, isn't it, right there?

A. It's a competitive contact.

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Q. Not only a competitive contact, he gave him the prices. It's more than a competitive contact.

A. That's correct, it's a violation of the policy.

Q. We need to distinguish between competitive contacts. You had competitive contacts?

A. No question.

Q. You handled them in the right way, by sending them to the lawyer and telling him we ain't interested, but this goes beyond a competitive contact, doesn't it?

A. Yes, sir.

Q. "After December, '74 sales meeting with antitrust compliance talk, he cut them off. No calls since then which he remembers, but he hasn't given or received price information since then. Has received price information in mails recently, and somewhat regularly, from Southeast and Union Camp."

Right?

A. Yes, sir.

Q. Clear violation?

A. Yes, sir.

Q. Okay, sir. Now, if I counted correct, that's 12 of the 41 people with pricing authority, as of the fall of '75, or 29 per cent of those with pricing authority in the Mead Corporation, admitted

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A. Yes, sir.

The Court: All right. We are going to recess until 9:30 in the morning.

(At 4:30, adjournment was taken until 9:30 A.M., August 27, 1980.)

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IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE:

CORRUGATED CONTAINER
ANTITRUST LITIGATION

TRANSCRIPT OF PROCEEDINGS

SEPTEMBER 9, 1980

VOLUME 95

(MORNING SESSION)

* * *

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1789, 1790, 1799;
1800, 1813;
1915, 1916, 1917, 1918, 1919, 1966 through 1972, 1977, 1983, 1984, 1989;
1994 and 1996;
1862, 1865, 1885, 1902, 1932 and 2009;
1973, 1974, 2027, 2028, 2029, 2031, and 2033.)

The Court: Now, Mr. Baker, Diane gives me a list, 4929 through 4971.

Mr. Baker: What are they?

The Court: Mead objected to introduction as to damage, has never been ruled on. On 8-5-80 Baker asked for a week to review and file, if any objections to exhibits. Nothing has been filed that I know of.

Mr. Ruyak: Are those the cross examination exhibits?

The Law Clerk: Those are the interrogatories, I imagine.

The Court: These are container directories.

The Law Clerk: Yes, they are the

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damage interrogatories.

Mr. Ruyak: We still object to those, because they in no way show——

Mr. Black: Those are not really necessary in view of the court's decision to submit the case on the——

The Court: Do you withdraw them?

Mr. Cohen: What numbers are we talking about?

The Court: 4929 throuhg 4971.

Here they are, come look at them.

Why don't you offer them into evidence, all of those exhibits, and I will sustain an objection to them on relevancy.

Mr. Black: Okay.

Mr. Cohen: And then should they become relevant, in view of a verdict, or language of verdict——

The Court: Just put the numbers in.

Diane, they offered them in evidence, I sustained the objection to them on the basis that they are not relevant to any issue before the jury.

Mr. Cohen: And that's Exhibits 4929

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through——

The Court: I assume your objection includes an objection on relevancy?

Mr. Ruyak: Yes. Simply stated, because they do not show the sales that the class would have had. They include intracorporate sales, they include sales to opt-outs, and they include sales to other defendants, and therefore they are not accurate dollar sales to the class by year.

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Mr. Cohen: Judge, that's another type of objection.

The Law Clerk: Not really.

The Court: I'm not ruling on that, I am ruling that, insofar as the case before the jury is concerned, they are immaterial. That is the basis upon which I am admitting them in evidence.

Mr. Cohen: And that's 4929 through 4971.

Mr. Ruyak: Your Honor, for the record——

The Court: Now, what else have I got to do?

Mr. Ruyak: —By raising the objection we raised, we are not waiving our objection to the use of the percentage calculations.

The Court: I understand that.

Mr. Ruyak: We have one more document, and I think—actually there are two documents. We don't object to the first one, it's a Mead Document, although they didn't ask Mr. Neff about it in his examination.

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fraudulent concealment, will you state to the jury something that absolves me from asking to reopen the case, because I don't care how you put it, whether you have changed your ruling, or whatever, or on the court's own——

The Court: I'm just going to say I have permitted you to reopen the case.

Mr. Baker: I don't want to reopen the case.

The Court: Mr. Baker, why not? You asked me to let you reopen the case.

Mr. Baker: No. The only reason that I am reading this in is because it's the court's view that the record is deficient to put the question of fraudulent concealment to the jury, and, as I understood it, the court has reopened it for that purpose.

The Court: I'll put it this way: I'll say, by virtue of the fact that the court changed its mind on a ruling, I have permitted Mr. Baker to reopen the case.

Mr. Baker: Right.

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The Court: Okay.

Mr. Baker: All right. For documents only.

Mr. Ruyak: For a few documents.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE:
CORRUGATED CONTAINER
ANTITRUST LITIGATION

TRANSCRIPT OF PROCEEDINGS

SEPTEMBER 9, 1980

VOLUME 96

(AFTERNOON SESSION)

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2280, 2277.

The Deputy Courtroom Clerk: I don't have 2280.

Mr. Baker: I know it. That's the one we don't have the original of and we will give you the original as soon as we get it back from our office.

The Court: All right. They will all be admitted into evidence——

Mr. Baker: All right. We are ready to go.

The Court: —As redated.

Mr. Black: Okay.

(Jury present, 2:03 P. M.)

The Court: Please be seated, ladies and gentlemen.

As a result of the fact that I changed my mind on a ruling on the admissibility into evidence of certain affidavits, I have permitted Mead to reopen its case to put those affidavits into evidence and have permitted the plaintiffs to introduce some rebuttal evidence. That is the reason I called you back today.

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All right.

Mr. Baker: With the court's permission, I would like to read to the jury a number of affidavits, the first being the affidavit of Theodore F. Craver.

"I am Staff Vice-President and Director of Trade Regulations for Litton Industries, Inc. ('Litton')".

I might say that Litton, if it please the court, is a client of my law firm.

The Court: All right, sir.

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"And am responsible for all Litton's antitrust and trade regulation matters. I have held this position with Litton with various titles, continuously since January 1, 1965. I was an attorney in the Antitrust Division of the U. S. Department of Justice. From April, '61 through December, '64 I was an associate with the Washington law firm of Hogan & Hartson. Thus, I have been practicing antitrust law continuously for the past 24 years.

"During the time that I have been with Litton, my duties and responsibilities have included administration of all antitrust litigation, both private and governmental, involving Litton; liaison with govern-

ment agencies and private parties regarding antitrust inquiries and investigations; counseling Litton officials and employees in antitrust matters; and in showing compliance by Litton with the antitrust laws.

"In order to carry out my duties and responsibilities, it has been

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necessary for me to have a detailed knowledge of the antitrust laws and principles and to keep abreast of new developments by legislation and court decisions.

"We have maintained at the law library at Litton certain periodicals.

"It has been my practice to follow these periodicals regularly and to read various articles in the law journals.

"When *United States versus Container Corporation* was first announced in the *Wall Street Journal,* I read the decision with great care and interest.

"I recall that the decision was widely reported not only in the legal journals, but in the general press. I also recall that the decision was also widely reported in the bulletins of various trade associations.

"Other Litton officials read of the container decision in various newspaper and magazine reports, and I had numerous discussions with division managers, marketing and sales personnel and in-house

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Litton attorneys immediately following the Supreme Court's decision in the *Container* case and on many occasions since then concerning the meaning and impact of the decision.

Because of the significance of the court's decision, I included a digest of the facts, the court's

holding, and the rationale for the court's holding along with an instruction to avoid calling competitors to verify past or current price bids for quotations to customers in a revision of Litton's *Guides for Compliance.*

"The *Guides* were published in a booklet.

"The *Guides* were again revised in '75."

Paragraph, quote, "An important part of Litton's antitrust compliance program is the holding of antitrust compliance meetings," et cetera.

Go on to the next page.

13. "A number of Litton divisions purchase containers of the type involved

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in the *Container* case, and this fact was known to me at the time of the Supreme Court's decision in 1969.

"I do not recall whether any division president asked me if Litton considered bringing a private antitrust suit for damages based on our purchases of such containers.

"I did not seriously consider Litton's bringing such an action because I deemed the time, effort and expense involved too great in relation to Litton's relatively small volume of purchases of containers to warrant Litton's institution of the lawsuit, compared to other pressing matters that were occupying Litton's management and the law department's legal time."

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Mr. Montague: May I make a statement concerning the affidavits?

Mr. Baker: I thought we had discussed that and that there weren't any statements to be made.

Mr. Montague: Quite to the contrary.

I just want to point out, Your Honor, that nothing in the affidavit shows——

Mr. Baker: Your Honor,——

The Court: I told you you could argue that. You can argue that to the jury.

Mr. Baker: (reading) James E. Rambo, being first duly sworn, deposes and says where he lives.

From April 15, 1965 until the present, I have been employed as Vice President and General Counsel of N.R.C. Corporation, formerly the National Cash Register Company, which manufactures and sells business equipment on a worldwide basis.

Because of the scope of our operations an important facet of my duties

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is to keep current on antitrust developments. To this end we have maintained in this office certain library materials.

4. Since 1967 a member of my staff, one of whose principal responsibilities has been trade regulation, has been a member of the antitrust section of the American Bar Association and has received and reviewed publications of that section.

Early in 1969, from one or more of the sources mentioned in paragraphs 3 and 4, I learned and became familiar with the decision and findings of *United States v. Container Corporation.*

N. C. R. was at that time, and remains today, a substantial purchaser of a variety of corrugated con-

tainers for the packaging and shipping of some of its smaller pieces of business equipment and some of its business forms products.

No discussions were held or investigations made to determine whether or not N. C. R. had a claim against manufacturers or sellers or corrugated containers, because

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of the priority of other business in the office.

In January, 1980 N. C. R. filed a claim in this litigation.

I am admitted to the bar of the Supreme Court of the State of Ohio, et cetera.

Turn back to the first page, so we can see what this litigation is.

The United States District Court for the Southern District of Texas, In Re: Corrugated Antitrust Litigation.

Next, affidavit of Lloyd C. Hartman, a member of the bar of California, employed as an attorney for F. M. C. Corporation until my retirement. Currently I continue to serve F. M. C. as a parttime legal consultant.

From 1955 to 1972 I was General Counsel for F. M. C. As part of my duties I was responsible for monitoring recent developments in the antitrust laws during 1969 and 1970.

The law department of F. M. C. Corporation

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maintains a law library.

The law department also had ready access to complete sets of *Federal Supplements, The Federal Reporter* Second Series, et cetera.

5. I first heard of the Supreme Court decision at or about the time the decision was reported.

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As reflected in *The United States vs. F. M. C. Corporation* case, *United States vs. Container* was an important case, and I was familiar with it at or about the time that it was decided by the Supreme Court.

As part of my duties and responsibilities, I regularly read the *Wall Street Journal.*

At the time of the Container decision, I was aware that the case involved corrugated shipping containers.

I have been a member of the antitrust section of the American bar.

In may capacity as General Counsel to F. M. C. Corporation, I recognized that the Supreme Court decision significantly affected the then existing law regarding contacts between competitors——

Mr. Montague: Your Honor, that was supposed to be excised.

Mr. Baker: Sorry, disregard 12.

13. The facts described in the container litigation involved the exchange of price information between

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competitors concerning a type of corrugated container which F. M. C. bought.

F. M. C. Corporation is a substantial purchaser of corrugated containers and many of our manufacturing facilities use corrugated containers in their shipment of finished goods.

18. The container case, along with other antitrust cases, was discussed with members of our management.

No operating personnel requested or suggested an investigation of a claim against Corrugated Container Manufacturers.

After circulating a memorandum about Container, I received no request from anyone to pursue the matter of a claim further.

No officers or employees of F. M. C. Corporation asked me whether or not we had a claim under the Antitrust Laws in view of the Container decision.

I did not direct any investigation of any possible claim of F. M. C.

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Corporation as a result of the Container case.

Although the F. M. C. Corporation purchased the types of corrugated containers that were the subject of the Supreme Court's decision, we conducted no investigation to determine whether or not the company had a claim under the Antitrust Laws in view of the Container case.

Following the Container case, I did not ask anyone else to study the advisability of bringing a lawsuit against Corrugated Container Manufacturers.

No lawyers on my staff suggested that we pursue an investigation of a possible claim by F. M. C. based on the Container decision.

I know of no investigation by anyone at F. M. C. to determine whether we had a claim against manufacturers or sellers of corrugated containers.

No one, either legal or business personnel, recommended to me that we investigate further any possible claim

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that we might have against Corrugated Container Manufacturers in view of the facts described in Container litigation.

F. M. C. Corporation did not pursue any possible claim against corrugated manufacturers and/or sellers of corrugated containers.

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Mr. Baker: Affidavit of William F. Rogers, of the Monsanto—William F. Rogers. My name is William F. Rogers, Antitrust Counsel, Monsanto Company.

Since 1964, I have been the Attorney directly responsible for antitrust for the Monsanto Company. During 1969-71, my title was Senior Attorney-Antitrust.

As a part of my duties and responsibilities I was responsible for keeping up to date on recent developments.

The Law Department maintained a law library.

Go ahead.

The library subscribed to certain things.

To keep up to date on such developments, I regularly reviewed certain publications.

I first heard about the Supreme Court decision and the findings in the *Container* case on or about the time the decision was first reported in the *Wall Street Journal.* I subsequently read and analyzed the full text of the

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opinions shortly after the opinions were published.

The *Container* case was an important antitrust case.

The *Container* case received widespread publicity in legal and lay publications.

I was aware at the time of the container decision that the case involved corrugated shipping containers.

During 1969 and to date I was and am a member of the Antitrust Section of The American Bar.

As a member of the Antitrust Section of The American Bar, I regularly attended the annual Spring meetings of the Antitrust Section, et cetera.

Monsanto was, and remains today a substantial purchaser of a wide variety of corrugated containers.

Many of our plants use corrugated containers.

As Senior Attorney, Antitrust, I was aware that Monsanto company might have an antitrust claim against corrugated

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container manufacturers. I did not recommend that Monsanto institute any action in pursuit of such claim.

George W. Caspar, Vice-President, Secretary and General Counsel of Heublein.

If it please the court, Heublein in the past has been a client of my law firm, although I have not personally done work for them.

I am Vice-President, Secretary and General Counsel of Heublein and held those positions since 1972. I am a member of the New York and Michigan bars, et cetera.

As part of my duties and responsibilities as Assistant and Associate General Counsel, I was responsible for keeping up to date on recent and/or significant developments in the antitrust law.

The Law Department maintained a Law Library.

As Assistant General Counsel, it was my responsibility to review reports, et cetera.

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I first heard about the Supreme Court's Decision and Findings in Container at or about the time the Decision was first reported in the *C. C. H. Reporter,* et cetera.

The *Container* Case was an important antitrust case.

I was aware of and familiarized myself with the *Container* Case at or about the time the Decision was published by the Supreme Court in January, 1969.

As part of my duties and responsibilities I regularly reviewed the *Wall Street Journal* and the *New York Times.* I was aware of articles that appeared in those newspapers concerning the Container Decision.

I have read the Supreme Court's Decision shortly after the Decision was published in January of '69.

From '62 to the present I have been a member of the Antitrust Section.

As a member of the Antitrust Section, I have regularly attended the Spring Meeting held every year in Washington,

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D. C. Many of our plants use corrugated containers.

Heublein has purchased substantial quantities of corrugated containers.

At Heublein we reviewed our own antitrust policy in light of the Supreme Court's Decision in the *Container* Case.

Daniel W. Byles, Senior Counsel, Corporate Staff of Merck & Company.

I have occupied my current position since 1964. Prior to that time I served on the Corporate Legal Staffs of the Vick Chemical Company and Hoffman-

Laroche, Inc. I am admitted to practice in the States of New Jersey and New York.

As part of my duties and responsibilities during the period of time I have served as Corporate Staff Counsel I have been responsible for keeping up to date on recent and significant developments in antitrust law.

They maintained a Legal Library. Subscribed to certain things.

To keep up to date I regularly reviewed the Weekly Reports and Decisions.

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I first heard about the Supreme Court Decision at or about the time the Decision was first reported.

I was aware at the time of the Container Decision that the case involved corrugated shipping containers.

I was aware of and familarized myself with the *Container* Case at or about the time the Decision was published by the Supreme Court.

I regularly reviewed the *Wall Street Journal* as well as the *New York Times.*

I was aware of articles that appeared in those newspapers concerning Container.

I read the Supreme Court Decision.

Merck was, and remains today, a purchaser of a wide variety of corrugated containers for packaging and shipping of pharmaceuticals, chemicals, and industrial cleansers and various products involved in pollution control systems. Over the years Merck has purchased substantial quantities of corrugated containers. Prior to 1977 Merck purchased

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corrugated containers for its since-divested consumer products business.

No one on my staff on the legal department made any recommendation to me concerning any investigation to see if we had a claim against manufacturers or sellers of corrugated containers after the Container Decision was published in 1969.

I did not direct any investigation of any possible claim of Merck as a result of the Container Case at that time, nor am I aware of any such investigation.

Merck & Company in the period 1969 to '79 did not pursue any possible claim against the manufacturers and/or sellers of corrugated containers.

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Donald Wiley of Pittsburg.

During the period 1964 to date, I have been General Counsel of H. J. Heinz Company—which is also, if it please the court, another client of my firm, although I personally have done no work for them——

The Court: All right, sir.

Mr. Baker: —H. J. Heinz Company, Pittsburg-based manufacturer of consumer food products. I am admitted to the Bar of the Supreme Court of the Commonwealth of Pennsylvania.

During the period through 1972, a significant part of my duties was to keep current on antitrust developments. I read or received summaries of significant antitrust decisions and read about them in the newspapers, also.

Go ahead.

At the time of the Container Decision, and through this date, Heinz Company was and is a substantial purchaser of corrugated boxes. During 1969, I received from members of my staff a number

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of memoranda on various seminars and publications dealing with the Container Case, including a memorandum of a speech given by Louis Bernstein, in Philadelphia, Pennsylvania, on April 10, 1969.

In May of 1970, H. J. Heinz Company Antitrust Compliance Letter was modified to reflect our understanding of the decision in the Container Case with respect to the exchange of price information.

Following the Container Decision, I conducted no investigation, nor am I aware of any other investigation at Heinz to determine whether the company had a claim against manufacturers or sellers of corrugated containers.

I attended at least one session of an American Bar Association Antitrust Section Meeting where the decision in the Container Case was discussed, and I engaged in general discussions with other lawyers present at the meeting relating to the Container Decision.

Herman T. Van Mell. My Address is

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180 North La Salle Street, Chicago.

During the period from 1948 to 1977, I was General Counsel of Sunbeam Corporation, Chicago based—which is another company, if it please the court, that my firm has done some work for.

The Court: All right, sir.

Mr. Baker:—Chicago-based manufacturer of small appliances sold to consumers. I retired in 1977.

A significant part of my duties was to keep current on antitrust developments. I read the weekly reports, et cetera.

Since at least 1969 to the present, I have been a member of the antitrust section of the American Bar Association. I have attended the meetings.

In 1970, through some of the above-mentioned and other sources, I became aware of the Supreme Court's decision in *United States v. Container Corporation of America* and was generally familiar with the court's decision that corrugated container manufacturers violated Section 1 of the Sherman Act.

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The facts described in the Container litigation involved the exchange of price information between competitors manufacturing and selling corrugated containers.

Sunbeam Corporation was at that time, and remains today, a substantial purchaser of a wide variety of corrugated containers for the packaging and shipping of small appliances which Sunbeam manufactures.

I discussed the Contained decision with outside counsel, who was long familiar with our company, to determine the *Container* case's impact, if any, upon Sunbeam's standing antitrust compliance program. He determined that Sunbeam's policy was in compliance with the holding of the *Container* case.

Following the *Container* case I conducted no investigation to determine whether our company had a claim against manufacturers or sellers of corrugated containers for Section 1 violations. I know of no investigation by anyone at

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Sunbeam to determine whether we had a claim against manufacturers or sellers of corrugated containers.

Robert H. Hosick, Kalamazoo, Michigan.

Admitted to practice in California, in the Supreme Court. I have been a staff attorney for the Upjohn Company from 1946 to 1977. My last title was as General Attorney.

In the 1940's to the 1970's I was counsel to, among others, in our organization, the marketing and purchasing staffs. I counseled on antitrust matters. I was for many years a member of the American Bar Association and the Michigan State Bar Antitrust Law, et cetera.

In the performance of my duties at the Upjohn Company I regularly kept current on antitrust concepts and new developments.

5. The Upjohn Company was a purchaser of corrugated containers through the 1960's and '70's for use in the packaging

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of pharmaceuticals and other products in plants located in numerous parts of the United States, including the southeast.

I did not authorize any investigation into whether our company had any claims against any suppliers of corrugated containers as a result of the Container decision.

I am not aware of any investigation within the Upjohn Company to ascertain whether we had a claim against any suppliers as a result of that decision.

The Container decision was a subject of discussion among the lawyers at the Upjohn Company.

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William F. Drake, address Alco Standard Corporation, Valley Forge, Pennsylvania.

I am currently Vice President of Administration of Alco Standard. I was Vice President and General Counsel of Alco between November, '68 and 1979. Prior to that time I had been associated with and later a partner of the Philadelphia law firm of Montgomery, McCracken, et cetera.

As part of my duties and responsibilities as General Counsel I was responsible for keeping up on significant developments.

The Law Department of Alco Standard maintained a library.

The keep up to date I reviewed reports.

I first learned about the Supreme Court decision at or about the time it was reported.

The *Container* case has received widespread publicity in legal and lay publications.

I was aware at the time of the

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Container decision that the case involved corrugated shipping containers.

As part of my duties and responsibilities I regularly reviewed the *Wall Street Journal.* I was aware of articles that appeared in those newspapers concerning the Container decision.

I also read about the decision in the Philadelphia Inquirer, the *Business Lawyer,* the *Antitrust Bulletin.*

I read the Supreme Court decision.

Alco Standard Corporation was, and remains today, a substantial purchaser of a wide variety of corrugated containers for the packaging and shipping of products which they manufacture.

Many of our plants use corrugated containers.

The *Container* case, along with other antitrust cases, was discussed with members of our management.

No officer or employees of our company asked whether we had a claim under the antitrust laws in view of the Container decision.

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Although Alco purchased the types of containers that were the subject of the decision, we conducted no investigation during 1969 or the early 1970's to determine whether we had a claim under the antitrust laws as to our past purchases of corrugated containers in view of the *Container* case.

I authorized no investigation by Alco during 1969 or the early 1970's to determine whether we had a claim against the manufacturers or sellers of corrugated containers for fixing or maintaining the price of those containers.

Alco Standard Corporation did not pursue during 1969 or the early 1970's any possible claim against the manufacturers and/or sellers of corrugated containers. This was in part because our corporate legal department had to determine where to expend its limited lawyer resources and at that time we did not place a high priority on the possibility of a claim for price fixing of corrugated containers.

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AFFIDAVIT OF LEWIS BERNSTEIN.

"My residence address is Mohican Hills, Maryland, and my office is 1140 Connecticut Avenue, Washington, D. C.

"Between 1959 and 1977, I was Chief of the Special Litigation Section, Antitrust Division, United States Department of Justice. Since my retirement

from the Department of Justice, I have been in private practice.

"The investigation which resulted in the Container case originated within the Antitrust Division and was conducted under my direct supervision. I was Chief Counsel responsible for developing the facts and legal theory supporting the department's position, and I personally presented the government's case to the District Court.

"The presentation consisted mainly of stipulated facts, documentary evidence, deposition testimony of defendants' officials, and oral argument.

"The facts in the Container case at the District Court level are a matter

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of public record and were largely stipulated. The District Court decided the case against the government on August 31, 1967.

"Container was decided in favor of the government by a divided Supreme Court. Justice Douglas wrote the majority for apparently five members of the court; Justice Fortas concurred; and three Justices (Marshall, Harlan, and Stewart) dissented from the holding of a Section One violation. The court's opinions were published on January 13, 1969.

"The majority decision by the Supreme Court remanding the case to the District Court for further consideration received exceptionally wide publicity and attention in antitrust legal circles. The Supreme Court opinion, I am informed and believe, was reported in numerous newspapers throughout the country, including the *Wall Street Journal* and the *New York Times.*

"In addition, this decision was the subject of numerous law review articles,

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seminars, both formal and informal, and speeches to various legal groups. I recall delivering a talk on the implications of the decision in Philadelphia, Pennsylvania. My notes indicate that the talk was given on April 10, 1969, at a luncheon meeting organized by the Philadelphia Chapter of the Federal Bar Association. I believe that thereafter, almost every article by, or discussion among antitrust lawyers involving the exchange of price information, highlighted the Container decision."

That concludes the reading of those.

At this time, Your Honor, I have—which have been admitted in evidence, if it pleases the court—a large number of newspaper and periodicals at or about, shortly after, the Container decision merely for the purpose of showing widespread publicity. Not to prove the accuracy of the newspaper headlines or anything like that, but merely to show dissemination, which I would like briefly to show.

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Greensboro Daily News, Chicago Sun Times, Atlanta Constitution.

"High court hits paper box firms," et cetera.

Go ahead.

Boxboard Containers, 1969, re the Greensboro case. "What the Supreme Court found and what price swap means to you."

The Wall Street Journal, The Los Angeles Herald Examiner. These are both January 15th, 1969. *The Kansas City Star* and *The New York Times.*

Purchasing Week, January 20, 1969. *The Raleigh News and Observer.* The *Purchasing Magazine,* January 20, 1969.

All right. Thank you, Your Honor.

The Court: All right.

Mr. Kipple.

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Mr. Kipple: Ladies and gentlemen, at this time, the plaintiffs have a rather short rebuttal case to present to you in terms of a few documents, few additional documents that we wish to read small portions of to you, and a few prior statements of individuals that we will read to you by a shortened procedure that I hope works out all right. I will read both the question and the answer.

The first document is No. 5266. Mead Containers Memo to Regional General Managers, District General Managers, District Sales Managers, General Manager-National Account Sales, National Accounts Sales Managers.

Subject: Price increase environment.

Date, January 13, 1972.

"Attached find two reports, the purpose of which is to assist regional management and the division in monitoring the environment in which our price increase program is being carried out. Their usage should be implemented

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE:
CORRUGATED CONTAINER
ANTITRUST LITIGATION

TRANSCRIPT OF PROCEEDINGS
SEPTEMBER 10, 1980
VOLUME 97
(MORNING SESSION)

• • •

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Perhaps, as I have suggested, that postponement is designed to make sure that those employees who testified or might have testified in this lawsuit continue to have, like Mr. Neff, a deep personal and abiding interest in the outcome of this case.

But, ladies and gentlemen, we have never, never criticized Mr. Baker for doing what he did in the fall of '75. It was a great idea. It should have been done earlier. And the results should have been discussed at least to top corporate officers, to the grand jury, and to the jury that heard the prior proceedings.

When you consider the circumstances, Mr. Baker and Mr. Wheland got some startling admissions. Of course, when you compare what the Mead mana-

gers told Mr. Baker and Mead's in-house counsel, Mr. Wheland, in '75, with what they told the grand jury a few years later, it is obvious that some of them, for obvious reasons, lied to Mead's lawyers about the extent of their pricing communications.

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Mr. Danehy, Foughnie, Hayes and Halford come to mind immediately.

Those lawyers in those interviews were, I'm afraid, much like the plaintiffs' lawyers have been during this trial, only able to uncover the tip of the iceberg.

On the other hand, Mr. Baker and Mr. Wheland were successful in uncovering some things that we couldn't unearth even when we took those folks' depositions under oath.

I have in mind here Messrs. Gestrich, Engen and Kessler. They told at least part of the truth to Mr. Baker and Mr. Wheland, but lied to us in their depositions. And one wonders why those three were not brought by Mead to this courtroom so they could be questioned openly about the inconsistencies.

Yesterday, you'll remember Mr. Kipple read you the sworn deposition testimony of Mr. Bob Gestrich that he had never discussed prices with competitors in 1975. At the same time, Mr. Kipple put up on that screen the one-on-one interview

• • •

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would fail to read carefully the numbers core strategies and business plans?

As you have seen, ladies and gentlemen, they establish an undeniable web of relationships and dependencies between and among separate Mead plants.

Let's return to the antitrust policy. You will recall Mead, in its opening statement, telling you that it had successfully implemented that policy and the proof will be that the vast majority of Mead employees lived up to that policy?

Well, I don't need to dwell long on that one. Maybe Mead didn't think the judge would require Mr. Baker to turn over to us his one-on-one interview notes because those notes, standing alone, indicate that 29 per cent of those folks who had pricing authority in '75 had violated the compliance policy. And if you add to that those who subsequently admitted to the grand jury but who did not tell Mead's lawyers that they had engaged in pricing communications, the

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number of violators comes up to whopping 39 per cent.

* * *

No. 80-1686

MAY 15 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

IN RE CORRUGATED CONTAINER ANTITRUST LITIGATION

THE MEAD CORPORATION,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, ET AL.,
(Adams Extract Co., *et al.* real parties in interest),
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF OF PETITIONER THE MEAD CORPORATION IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI

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In its opposition, respondents assert in direct reference to this Court's Rule 17 that:

> Petitioner Mead has shown . . . [1] no conflict with the decisions of this Court, [2] no important question of federal law that this Court has not previously decided, and certainly [3] no unusual

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* Pursuant to Rule 28.1 of the Rules of the Supreme Court, Mead refers to the list of subsidiaries and affiliates contained in its previously filed Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

departure from the normal course of judicial proceedings. Opposition at 16.

The opposition is wrong on each count.

(1) The Decision Below Is Squarely in Conflict with *Hodges* v. *Easton*, 106 U.S. 408 (1882)

The decision below is flatly contrary to this Court's decision in *Hodges* v. *Easton*, 106 U.S. 408 (1882). There, the trial court submitted only a part of the issues in a single cause of action to the jury, "itself determining the remainder" on the theory that the remaining facts were "conceded or not disputed." This Court held that, where the Seventh Amendment applies, *all* facts must be submitted to the jury albeit pursuant to a "peremptory instruction" where appropriate, and consequently ordered a new trial. *This Court then specifically rejected the claim that the new trial should only cover the issues withheld from the first jury.*

In ordering a retrial on *all* issues, the Court in *Hodges* took particular note of the cases in which a full jury trial was held, followed by partial reversal on appeal, and in which a retrial was limited to those issues not properly tried in the first place. It expressly *reserved judgment* on whether these cases were "sound or not." Since, in *Hodges*, as in this case, there had never been a full jury trial in the first place, the Court ordered a full jury trial on all issues on remand. *See Hodges* v. *Easton*, 106 U.S. at 412-13 (last paragraph). Unless *Hodges* has been overruled by *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931), it precludes splitting a jury trial into two trials before two fact-finders. Although lower courts are in confusion on the point, *Gasoline Products Co.*, as set forth below, decided only the question left open in *Hodges*, *i.e.*, whether after a *full* jury trial in the first instance, a retrial following reversal on appeal could be limited only to those issues infected by error below.

(2) This Case Poses an Important Issue of Seventh Amendment Law Which the Lower Courts View as Unresolved

Mead's petition raises an important question of federal law that the lower courts view as unresolved. That issue is whether, after *Gasoline Products Co.*, district courts have discretion to split a single cause of action into two trials before different juries or whether the constitutional right to jury trial still includes the right to have the whole case—*i.e.*, all issues in a single cause of action—presented to a single jury. The Fifth Circuit Court of Appeals just recently addressed this same issue, stating:

> There is a still unanswered question whether the seventh amendment right to a jury trial permits the separate phases of a trial to be submitted to different juries. . . . It was wise for the trial judge to avoid the constitutional problem if he could properly do so.

Dunn v. *Sears, Roebuck & Co.*, 639 F.2d 1171, 1174 (5th Cir. 1981) (citations omitted).

In *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931), a full trial on all issues was had to a jury. On appeal, the court found error on the damage issue only and remanded for a new trial. The issue then presented to this Court was the issue which had been left open in *Hodges* v. *Easton*—namely, whether the new trial should be on all issues or just on the issue infected with error. This Court said that the case once having been fully submitted to a single jury, might in some circumstances be retried only on the issue infected with error. *Gasoline Products Co.*, however, did not expressly, or otherwise, purport to overrule *Hodges*. Many lower courts have erroneously assumed that it did and others have expressed confusion on this issue, particularly in recent opinions in antitrust class action litiga-

tions. This is an issue of paramount importance which only this Court can resolve.

(3) The Proceedings Below Involve an Unusual Departure from the Normal Course of Judicial Proceedings

This case involves a departure from the normal course of judicial proceedings never before countenanced in the history of American jurisprudence. Here, the district court judge bifurcated the case only *after* the end of the jury trial.

CONCLUSION

Based upon the foregoing, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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